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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 212

**HURON HOLDING CORPORATION AND NATIONAL
SURETY CORPORATION, PETITIONERS,**

vs.

LINCOLN MINE OPERATING COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.**

PETITION FOR CERTIORARI FILED JULY 5, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

WILLIAM H. LANGROISE,
SAM S. GRIFFIN,
ERLE H. CASTERLIN,
Boise, Idaho,
Attorneys for Appellant.

JESS HAWLEY,
OSCAR W. WORTHWINE,
Boise, Idaho,
Attorneys for Appellees. [2*]

In the District Court of the United States for the
District of Idaho, Southern Division

No. 1953

LINCOLN MINE OPERATING COMPANY,
a corporation,

Plaintiff,

vs.

MANUFACTURERS TRUST COMPANY, a corporation,
HURON HOLDING CORPORATION,
FRED TURNER and ALEXANDER
LEWIS,

Defendants.

JUDGMENT

This action came on regularly for trial, said parties appearing by their attorneys. A jury of twelve

*Page numbering appearing at the foot of page of original certified Transcript of Record.

persons was regularly empaneled and sworn to try said action and witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into court, and being called, answered to their names and presented their written verdict, as follows:

[Title of District Court and Cause.]

“We, the jury in the above entitled case, find for the plaintiff and assess its damages against the defendant Huron Holding Corporation, in the sum of \$6730.70.

CARL BEESON,

Foreman.”

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that the plaintiff have and recover from said defendant, the Huron Holding Corporation, the sum of Sixty-seven Hundred Thirty and 70/100 Dollars (\$6730.70), with interest thereon from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$79.42.

Witness The Honorable Charles C. Cavanah, Judge of said Court, and the seal thereof this 3rd day of March, 1938.

[Seal]

W. D. McREYNOLDS,

Clerk.

[Endorsed]: Filed March 3, 1938. [4]

[Title of District Court and Cause.]

ORDER

The application of the defendant Huron Holding Corporation for a new trial having been presented and after consideration of the same it is Ordered that said application be and the same is denied.

Dated April 16, 1938.

CHARLES C. CAVANAH,

District Judge.

[Endorsed] : Filed April 16, 1938. [5]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The defendant, Huron Holding Corporation, having this day filed its petition for appeal from the judgment in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors, and having petitioned for an order to be made fixing the amount of security which defendant should give and furnish upon said appeal, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said appeal;

Now, Therefore, It Is Ordered that the said defendant, Huron Holding Corporation, on filing with the Clerk of this Court a good and sufficient under-

taking in the sum of \$10,000.00 to the effect that if the defendant, Huron Holding Corporation, shall prosecute the said appeal to effect and answer all damages, interest and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and virtue, the said undertaking to be approved by this court, that all proceedings in this court be and they are hereby suspended and stayed until the determination of said appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 31st day of May, 1938.

CHARLES C. CAVANAH,

District Judge.

[Endorsed]: Filed May 31, 1938. [6]

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Know All Men By These Presents: That National Surety Corporation, a corporation created, organized and existing under and by virtue of the laws of the State of New York, and authorized to transact a surety business in the State of Idaho, is held and firmly bound unto Lincoln Mine Operating Company, a corporation, in the full and just sum of Ten Thousand Dollars (\$10,000.00), lawful money of the United States, to be paid to the said Lincoln Mine Operating Company, a corporation,

its successors or assigns, to which payment, well and truly to be made, the said National Surety Corporation, a corporation, binds itself; its successors and assigns, by these presents.

Sealed with our seal, and dated this 31st day of May, 1938.

Whereas, lately, at the February, 1938, term of the District Court of the United States, for the District of Idaho, Southern Division, in a suit pending in said court between Lincoln Mine Operating Company, plaintiff, and Manufacturers Trust Company, a corporation, Huron Holding Corporation, a corporation, Alexander Lewis, and Fred Turner, defendants, a judgment was rendered against the said Huron Holding Corporation, a corporation, on March 3, 1938, at the said term of court, and the said Huron Holding Corporation, a corporation, has petitioned for and been allowed, by the Hon. Charles C. Cavanah, Judge of the said District Court, an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and a citation has been issued, directed to the said Lincoln Mine Operating Company, a corporation, citing it to appear in the said United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, within thirty days from the date of such citation.

Now, the condition of the above obligation is such that if the said Huron Holding Corporation, a corporation, shall prosecute its said appeal to effect,

and shall answer all damages, [7] interest, and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

[Seal] NATIONAL SURETY CORPORATION,

By GEO. C. WALKER,

Its Attorney-in-fact.

Countersigned by:

GEO. C. WALKER,

Its resident agent, residing at
Boise, Idaho.

Approved May 31st, 1938:

CHARLES C. CAVANAH,

United States District Judge.

[Endorsed]: Filed May 31, 1938. [8]

[Title of District Court and Cause.]

MANDATE

United States of America—ss.

The President of the United States of America

[Seal]

To the Honorable the Judges of the District Court
of the United States for the District of Idaho,
Southern Division—Greeting:

Whereas, lately in the District Court of the
United States for the District of Idaho, Southern

Division, before you, or some of you, in cause between Lincoln Mine Operating Company, a corporation, Plaintiff, and Manufacturers Trust Company, a corporation, Huron Holding Corporation, a corporation, Alexander Lewis and Fred Turner, Defendants, No. 1953, a Judgment was duly filed on the 3rd day of March, 1938, which said Judgment is of record and fully set out in said cause in the office of the Clerk of the said District Court, to which record reference is hereby made and the same hereby expressly made a part hereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by Huron Holding Corporation, a corporation, as appellant, against Lincoln Mine Operating Company, a corporation, as appellee, agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the third day of February, in the year of our Lord One Thousand Nine Hundred and thirty-nine the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record, and was duly submitted: [9]

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered and adjudged by this Court that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

(February 7, 1939).

You, Therefore, Are Hereby Commanded, That such execution and further proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the 9th day of March, in the year of our Lord One Thousand Nine Hundred and thirty-nine.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed March 13, 1939. [10]

[Title of District Court and Cause.]

NOTICE OF ATTORNEYS' LIEN.

Notice Is Hereby Given, That the undersigned attorneys claim a lien for their services upon the cause of action in the above entitled cause, and any judgment rendered therein for the plaintiff, upon all papers in their possession in connection with said cause, and all monies in their hands or in the hands of the adverse party, or in the hands of any surety for the said adverse party, upon appeal for costs or supersedeas, and upon all personal property

mentioned and described in plaintiff's complaint and involved in this cause of action, together with interest due and to become due thereon from March 3, 1938. Said claim is for the agreed sum of 331 $\frac{1}{3}$ % of the recovery in said action, either in money or in property, together with costs and expenses due to such attorneys in said cause, or connected therewith, no part of which has been paid.

Dated: January 26, 1939.

W. H. LANGROISE,

E. H. CASTERLIN,

SAM S. GRIFFIN,

Attorneys for Plaintiff,

Residence: Boise, Idaho.

[Endorsed]: Filed Jan. 27, 1939. [11]

[Title of District Court and Cause.] :

MOTION FOR SATISFACTION OF
JUDGMENT.

Comes Now, the Huron Holding Corporation, a corporation, the defendant in the above entitled action, for itself and on behalf of the National Surety Corporation, a corporation, which is the surety on that certain supersedeas bond in the amount of \$10,000.00 filed in the above entitled action, and moves the above entitled court to make and enter an order satisfying the judgment made and entered herein against the Huron Holding Corporation, a corporation, which said judgment was entered upon the 3rd day of March, 1938, and was

in the amount of \$6,730.70, together with costs incurred by said plaintiff in this court in the amount of \$79.42, and costs awarded it by the Circuit Court of Appeals for the Ninth Circuit, upon the grounds and for the reason that said judgment including costs has been fully paid and discharged, and that the same was paid as follows, to-wit: [12]

I.

That the said defendant, Huron Holding Corporation, a corporation organized and existing under the laws of the State of New York, has paid the sum of \$4,805.55 upon said judgment; that said sum was paid by said defendant upon said judgment upon about the first day of March, 1939, under a levy and warrant of attachment issued out of the Supreme Court of the State of New York, County of New York, in the case of Manufacturers Trust Company, a corporation, plaintiff, vs. Lincoln Mine Operating Company, a corporation, defendant, which case is pending in the Supreme Court of the State of New York, for the County of New York, and in which said cause the following proceedings were had:

(a) That on or about the 29th day of June, 1938, the said Manufacturers Trust Company filed an action against the Lincoln Mine Operating Company, the judgment creditor herein, in the Supreme Court of the State of New York, for the County of New York, and caused a warrant of attachment to be issued against any property found in New York

County belonging to the said Lincoln Mine Operating Company; that the situs of the judgment obtained in the above entitled cause was in the State of New York by reason of the fact that the judgment creditor, the Huron Holding Corporation, was a citizen and resident of the State of New York.

(b) That said warrant of attachment was served upon the Huron Holding Corporation, a corporation, by the Sheriff of New York County on or about the 12th day of July, 1938, and that the said Sheriff by said warrant of attachment attached the said judgment which was entered in this court [13], against the defendant herein, Huron Holding Corporation, a corporation, upon the 3rd day of March, 1938, in the amount of \$6,730.70.

(c) That the said Huron Holding Corporation, pursuant to said writ of attachment, on or about the 15th day of July, 1938, executed and delivered to said Sheriff its certificate specifying the indebtedness owing by it to said Lincoln Mine Operating Company upon said judgment.

(d) That the said Sheriff of New York County on July 19, 1938, duly filed his report and appraisal of said property so attached.

(e) That the said plaintiff herein, Lincoln Mine Operating Company, was duly served with process in the said case pending in the State of New York on July 18, 1938.

(f) That the said Lincoln Mine Operating Company, a corporation, the defendant in the New York

action, defaulted and failed to appear in the New York court in said cause.

(g) That on February 25, 1939, a judgment was recovered in said New York action against the said Lincoln Mine Operating Company in the total amount of \$15,842.02.

(h) That, thereafter an execution upon said judgment was had against the property attached, to-wit:

The judgment held against the Huron Holding Corporation by the Lincoln Mine Operating Company entered in this court on the 3rd day of March, 1938.

(i) That the said Sheriff of New York County, by virtue of said warrant of attachment, judgment and execution, on or about the first day of March, 1939, collected and [14] received from the Huron Holding Corporation the sum of \$4,805.55, which is the amount of the judgment obtained in this court, together with interest and costs, less one-third thereof, which said one-third is claimed by the attorneys for the plaintiff, Lincoln Mine Operating Company, as attorneys' fees by virtue of a lien filed by them on the judgment in the above entitled court.

(j) That the said Sheriff of New York County has paid to the Manufacturers Trust Company the amount so collected by him less his legal fees and expenses, to-wit, the sum of \$4,642.42, which amount the Manufacturers Trust Company has applied upon the judgment entered and recovered by it in the Supreme Court of New York for New York County against the Lincoln Mine Operating Company.

That all the facts above set forth are shown by the affidavit of Leonard G. Bisco, which is hereto attached and marked Exhibit 1, to which said affidavit of Leonard G. Bisco is attached a certified copy of the judgment roll in the case of Manufacturers Trust Company, a corporation, plaintiff, vs. Lincoln Mine Operating Company, defendant, which certified copy of judgment roll is attached to the affidavit of Leonard G. Bisco and marked Exhibit A, and to which is attached a certified copy of the warrant of attachment, which is attached to the affidavit of Leonard G. Bisco and marked Exhibit B, and to which is attached a certified copy of the inventory of the attached property, which is attached to the affidavit of Leonard G. Bisco and marked Exhibit C. [15]

That all of said certified copies relate to the papers and files and judgment roll in said case of Manufacturers Trust Company vs. Lincoln Mine Operating Company pending in the Supreme Court of the State of New York, for the County of New York, and are duly certified according to law.

That also attached hereto is the affidavit of William L. Schneider, marked Exhibit 2, to which is attached the following named papers in the case pending in New York entitled "Manufacturers Trust Company, plaintiff, vs. Lincoln Mine Operating Company, defendant":

Exhibit A: Copy of Summons and Complaint.

Exhibit B: Copy of Warrant of Attachment and affidavit in aid thereof.

Exhibit C: Copy of affidavit which shows service upon the Lincoln Mine Operating Company.

Exhibit D: Copy of transcript of judgment entered in said Supreme Court of New York, County of New York, in said cause.

Also attached hereto is the affidavit of Lester R. Bessell, the Vice-President and Assistant-Treasurer of Huron Holding Corporation, a corporation, marked Exhibit 3, to which affidavit is attached as Exhibit A, Notice of Property Attached, which shows the attachment of \$6,730.70 with interest from March 3, 1938, the same being the amount of and the judgment obtained in this court against the said Huron Holding Corporation, and to which is attached the receipt of John T. Higgins, Sheriff of New York County, State of New York, showing the payment by said Huron Holding Corporation to said Sheriff in said cause of the amount of \$4,805.55.

[16]

That all of said affidavits, to-wit, the affidavits of Leonard G. Bisco, William L. Schneider and Lester R. Bessell, and the exhibits attached thereto, including said certified copies, are hereby referred to and by this reference are hereby made a part thereof.

II.

That on or about the 27th day of January, 1939, W. H. Langroise, Sam S. Griffin, and E. H. Casterlin, attorneys for the Lincoln Mine Operating Company, a corporation, the plaintiff in this action, served upon the Huron Holding Corporation, a cor-

poration, and the National Surety Corporation, a corporation, as surety upon a supersedeas bond in the above entitled action, and filed in the above entitled court a notice of attorneys' lien wherein said attorneys claimed a lien for their services upon the cause of action of the plaintiff in the above entitled action and any judgment rendered therein for the agreed sum of $33\frac{1}{3}\%$ of the recovery in said action, either in money or in property, together with costs and expenses due such attorneys in said cause or connected therewith, and that said attorneys claim that they have \$367.23 due them from the said plaintiff as costs and expenses in the prosecution of said action. That one-third of said judgment with interest thereon amounts to the sum of \$2,380.05. That the said defendant herein, Huron Holding Corporation, has paid to said William H. Langroise, Sam S. Griffin and E. H. Casterlin, the said sum of \$2,380.05, and in addition to the payment of said sum has paid to said attorneys on their claim for costs and expenses the said [17] *the said* further sum of \$367.23 or a total of \$2,747.28, and the said attorneys have satisfied their lien claim by written satisfaction filed in the above entitled cause, which written satisfaction shows the payment to said attorneys of the said sum of \$2,747.28.

This motion is made upon the records and files in this action and upon the affidavits of Leonard G. Bisco, William L. Schneider and Lester R. Bessell, which are hereto attached and served herewith, and the exhibits referred to in said affidavits, and certi-

fied copy of the judgment roll, certified copy of warrant of attachment, and certified copy of inventory of attached property which are attached to the affidavit of Leonard G. Bisco. That a copy of said Satisfaction of Lien for attorneys' fees is hereto attached and marked Exhibit No. 4.

Wherefore, the Huron Holding Corporation, a corporation, moves the above entitled court to make and enter an order fully satisfying the judgment herein made and entered upon the 3rd day of March, 1938, and to satisfy the amount directed to be paid in the mandate from the Circuit Court of Appeals of the Ninth Circuit.

JESS HAWLEY,
OSCAR W. WORTHWINE,
HAWLEY & WORTHWINE,

Residence: Boise, Idaho,
Attorneys for Defendant.

(Service accepted) [18]

EXHIBIT "A"

Supreme Court of the State of New York,
County of New York

MANUFACTURERS TRUST COMPANY,
Plaintiff,

against

LINCOLN MINE OPERATING COMPANY,
Defendant.

SUMMONS

To the Above Named Defendant:

You Are Hereby Summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated June 28th, 1938.

NEWMAN & BISCO,

Attorneys for Plaintiff.

(Office and Post Office Address)

165 Broadway, Borough of
Manhattan, City of New York.

[Title of New York Court and Cause.]

COMPLAINT

Plaintiff, by Newman & Bisco, its attorneys, for its complaint herein, alleges:

1. That plaintiff is a domestic corporation.
2. Upon information and belief, that at the times hereinafter mentioned defendant was and still is a foreign corporation organized and existing under the laws of the State of Idaho.
3. Upon information and belief, that defendant has never been authorized to do business in the State of New York.
4. That on or about June 14, 1929, in the City and State of New York, defendant, for value received, made and delivered to one Alexander Lewis its written promissory note for \$10,000, a photostatic copy of which is hereto annexed, marked "Exhibit A" and made part hereof.
5. That thereafter and before maturity, said note was duly endorsed by said Alexander Lewis and so endorsed was delivered to Plaintiff, which is now the owner and holder thereof.
6. That prior to the commencement of this action, payment of said note was duly demanded according to its tenor, but the same was not paid.
7. That there is now due and owing to plaintiff upon said promissory note the sum of \$10,000.00 with interest thereon from June 14th, 1929, no part of which has [20] been paid, although duly demanded.

Wherefore, plaintiff demands judgment against defendant in the sum of \$10,000.00 with interest thereon from June 14, 1929, besides the costs and disbursements of this action.

NEWMAN & BISCO,

Attorneys for plaintiff.

Office & P. O. Address 165
Broadway, Borough of Man-
hattan, City of New York.

[21]

[Title of New York Court and Cause.]

**AFFIDAVIT FOR WARRANT
OF ATTACHMENT**

State of New York,
County of New York—ss.

William L. Schneider, being duly sworn, deposes and says:

That the above entitled action is one to recover a sum of money only as specified in Section 902 of the Civil Practice Act. That said action is brought to recover upon a promissory note executed and delivered by defendant to one Alexander Lewis, dated June 14, 1929, in the sum of \$10,000, payable on demand at the office of the plaintiff, 139 Broadway, New York City. This note was duly endorsed and delivered by said payee thereof and is now held and owned by the plaintiff herein, as set forth in the verified complaint herein, hereto attached, marked "Exhibit A" and made part hereof. [22]

That the defendant is a foreign corporation and is not a resident of the State of New York and that at all the times in question herein said corporation was and still is a resident of and doing business in the State of Idaho, in which it was incorporated and that said defendant has never been authorized to do business within the State of New York and is not now doing business within said state. That the principal office and place of business of the defendant is in Boise, Idaho.

That plaintiff has commenced the above entitled action against defendant for the cause of action above stated and has issued a summons herein, a copy of which is hereto annexed and made part hereof, but that no service thereof has been made upon the defendant.

That no previous application for any warrant of attachment has been made in this action to any Court or Justice and that no warrant of attachment for similar relief has ever been granted here.

Dated June 29, 1938.

W. L. SCHNEIDER. [23]

[Title of New York Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Ada—ss.

Marvin E. Wright, being duly sworn, deposes and says:

That he is a deputy Sheriff of Ada County, State of Idaho, and that on the 18th day of July, 1938, at Owyhee Hotel, City of Boise, Ada County, State of Idaho, he served the summons and complaint in the above entitled action on Lincoln Mine Operating Company, an Idaho corporation, the defendant therein named, by delivering to and leaving a true copy of each thereof personally with William I. Phillips, an officer of said corporation, to wit, its President.

Deponent knew said corporation so served as aforesaid to be the same corporation mentioned and described in said summons and complaint as the defendant therein, and knew said William I. Phillips to be such officer thereof at that time.

Deponent is over the age of 21 years and not a party to the action.

MARVIN E. WRIGHT.

Subscribed and sworn to before me this 23rd day of July, 1938.

[Notarial Seal] WALTER G. BELL,
Notary Public for the State of Idaho, residing at
Boise, therein. My commission expires February 17, 1939. [24]

[Title of New York Court and Cause.]

MINUTES OF THE COURT OF
FEBRUARY 25, 1939

Upon reading and filing the annexed affidavit of regularity of Benjamin Gothelf, sworn to the 23rd

day of February, 1939, and upon the deposition of Alfred D. Rubin, sworn to the 24th day of February, 1939, and upon all previous papers, pleadings and proceedings made, had and filed herein, and it appearing to the satisfaction of this Court that the summons and complaint was duly served on the defendant, Lincoln Mine Operating Company, by personal service outside of the State of New York, and that the action is brought upon one of the causes of action specified in Section 902 of the Civil Practice Act, and that an attachment against the property of the defendant was duly issued by this Court to the Sheriff of New York County who duly levied thereon, and that the time for said defendant to appear or answer herein has expired, and has not been extended by stipulation or otherwise, and said defendant has not answered or appeared herein, and it further appearing to the satisfaction of this [25] Court that the defendant, Lincoln Mine Operating Company is indebted to the plaintiff in the sum of \$10,000.00 with interest from the 14th day of June, 1929,

Now, on motion of Newman & Bisco, attorneys for the plaintiff it is

Ordered, that the Clerk of the Court be and he hereby is directed to enter a judgment in favor of the plaintiff, Manufacturers Trust Company of 55 Broad Street, in the Borough of Manhattan, City and State of New York, against the defendant, Lincoln Mine Operating Company, in the sum of \$10,000.00 with interest in the sum of \$5,806.67, a total

of \$15,806.67, together with costs and disbursements to be taxed by the Clerk of this Court, and that the plaintiff, Manufacturers Trust Company, have execution against said defendant therefor.

Enter

T A L

J. S. C.

[Endorsed]: Filed Feb. 27, 1938 (State Court.)

[26]

[Title of New York Court and Cause.]

JUDGMENT

Upon reading and filing the order of Mr. Justice Timothy A. Leary, dated the 25th day of February, 1939,

Now, on motion of Newman & Bisco, attorneys for the plaintiff herein, it is

Adjudged, that the plaintiff, Manufacturers Trust Company, of 55 Broad Street, Borough of Manhattan, City and State of New York, do recover of the defendant, Lincoln Mine Operating Company of the City of Boise, State of Idaho, the sum of \$10,000.00, with interest in the sum of \$5,806.67, together with costs and disbursements in the sum of \$35.35, making in all a total of \$15,842.02 and that the plaintiff, Manufacturers Trust Company, have execution therefor.

Dated, New York, February 27th, 1939.

ARCHIBALD R. WATSON,

Clerk. [27]

[Title of New York Court and Cause.]

WARRANT OF ATTACHMENT

The People of the State of New York to the Sheriff
of the County of New York:

Whereas, an application has been made to the Justice granting this warrant by the above named plaintiff, for a warrant of attachment against the property of Lincoln Mine Operating Company, the defendant in the above entitled action, and whereas a summons has been duly issued in this action and it appears to the satisfaction of the Justice granting this warrant, by the verified complaint of the plaintiff and by the affidavit of William L. Schneider, sworn to the 29th day of June, 1938, that the action is brought upon one of the causes of action specified in Section 902 of the Civil Practice Act, and that said cause of action exists in favor of the above named plaintiff against the above named defendant to recover a sum of money only, to-wit, the sum of \$10,000.00 with interest thereon from June 14, 1929, by reason of defendant's liability on the promissory note made and executed by it and now lawfully held and owned by plaintiff, a copy of which note is attached to and made a part of plaintiff's said verified complaint, and it appearing that plaintiff is entitled to recover said sum from the defendant over and above all set-offs and counter-claims known to plaintiff, and [28] whereas it further appears to the satisfaction of the undersigned that plaintiff herein is entitled to a warrant of at-

tachment against the property of the defendant herein upon the ground that the defendant is a foreign corporation and is not a resident of the State of New York, and whereas plaintiff has given the undertaking required by law,

You Are Hereby Commanded and Required to attach and safely keep so much of the Property within your County which the said defendant, Lincoln Mine Operating Company, has or which it may have at any time before final judgment in this action, as will satisfy the plaintiff's said demand as hereinabove set forth, together with costs and disbursements, and that you proceed herein in the manner and make your return herein within the time prescribed by law.

Witness, Hon. Aron Steuer, one of the Justices of said Supreme Court, at the County Court House, in the City and County of New York, on the 12th day of July, 1938.

ARON STEUER,

Justice of the Supreme Court
of the State of New York.

NEWMAN & BISCO,

Attorneys for plaintiff.

Office & P. O. Address 165

Broadway, Borough of Man-
hattan, City of New York.

(On reverse side:)

"Received Powers July 12, 1938, Fee \$5.55. Attachment merged into Judgment execution issued 3-1-39. .03146.

DANIEL E. FINN, JR.,

Sheriff,

WILLIAM M. POWERS,

Deputy." [29]

[Title of New York Court and Cause.]

WARRANT OF ATTACHMENT ISSUED

July 12, 1938, for \$10,000.00.

Inventory, made pursuant to Section 921 of the Civil Practice Act of the property of the Defendant Lincoln Mine Operating Company in the above action so far as the same has come to the hands, possession or knowledge of the Sheriff of the County of New York, by virtue of a Warrant of Attachment issued herein by Hon. Aron Steuer, taken with the assistance of Max Cohen and George Welch two disinterested freeholders, duly appointed and sworn to assist in taking the same, this 22nd day of July, 1938.

A certificate from Huron Holding Corporation, a New York corporation, at 55 Broad Street, City, County and State of New York, that it is the defendant against which judgment was entered in favor of the above named Lincoln Mine Operating Company as plaintiff in the United States District Court for the Dis-

trict of Idaho, Southern Division, on or about March 3, 1938, for \$6,730.70, with interest thereon from March 3, 1938, and that said judgment is still unpaid—subject to the rights of said Huron Holding Corporation on the appeal taken by it from said judgment and now pending in said court.

\$6730.70. [30]

And the aggregate value thereof is appraised by them the sum of Six Thousand and Seven Hundred Thirty and 70/100 Dollars.

GEORGE WELCH,
MAX COHEN,

Appraisers.

County of New York—ss.

I Certify that the foregoing is the inventory and appraisal of the property levied on and attached by me on the 12 day of July, 1938, as the property of the Defendant Lincoln Mine Operating Company under and pursuant to the Warrant of Attachment above described.

DANIEL E. FINN, JR.,
Sheriff of the County of New York. [31]

The People of the State of New York
To the Sheriff of the County of New York,
Greeting:

Whereas, judgment was rendered on the 27th day of February, 1939, in an action in the Supreme Court of the State of New York, between Manufac-

turers Trust Company, plaintiff, and Lincoln Mine Operating Company, defendant, in favor of said Manufacturers Trust Company, plaintiff, against said Lincoln Mine Operating Company, defendant, for the sum of \$15,842.02 as appears to us by the judgment roll filed in the office of the Clerk of the Supreme Court, County of New York, and

Whereas, a transcript of the said judgment was docketed in your county on the 27th day of February, 1939, and the sum of \$15,842.02 is now actually due thereon, and

Whereas, a warrant of attachment was on the 12th day of July, 1938, duly issued in said action, directed to you and a levy having been duly made thereunder upon property of the judgment debtor;

Therefore, We Command You, that you satisfy said judgment out of the personal property attached and if that is insufficient out of the real property attached, and return this execution within sixty (60) days after its receipt by you, to the Clerk of the Supreme Court of the State of New York, County of New York.

Witness, Hon. Timothy A. Leary, one of said Justices of said Supreme Court at the County of New York, the 28th day of February, 1939. [32]

NEWMAN & BISCO,

Attorneys for plaintiff,
Office and P. O. Address, 165
Broadway, Borough of Man-
hattan, City of New York.

(On reverse side of sheet:)

"I have made on the within execution the sum of 4,642.42 and I can find no property, personal or real, whereof I can make the residue.

DANIEL E. FINN, JR.,

Sheriff,

WILLIAM M. POWERS,

Deputy." [33]

EXHIBIT "A"

[Title of New York Court and Cause.]

NOTICE OF PROPERTY ATTACHED

To Huron Holding Corporation,
45 Beaver Street,
Borough of Manhattan,
City of New York.

Please Take Notice, that by virtue of the warrant of attachment issued in this action, a certified copy of which is herewith served upon and left with you, I have levied upon and do hereby levy upon the judgment obtained by the defendant, Lincoln Mine Operating Company, a foreign corporation organized and existing under the laws of the State of Idaho, as plaintiff, against you, Huron Holding Corporation, a New York corporation, as defendant, on the 3rd day of March, 1938, for the sum of \$6,730.70 with interest thereon from March 3, 1938, which judgment was obtained and filed in the United States District Court for the District of

Idaho, Southern Division, on or about March 3, 1938.

Dated, New York, July 12, 1938.

DANIEL E. FINN, JR.,
Sheriff of New York County. [34]

“EXHIBIT A”

July 15, 1938

Daniel E. Finn, Jr., Esq.,
Sheriff, New York County,
Hall of Records,
31 Chambers Street,
New York City.

Dear Sir:

Referring to the certified copy of the warrant of attachment and your notice of property attached, served by you upon us on July 12, 1938, in the action entitled “Supreme Court, New York County, Manufacturers Trust Company, Plaintiff, against Lincoln Mine Operating Company, Defendant”, we beg to inform you that the undersigned, Huron Holding Corporation, is the defendant against which judgment was entered in favor of the above named Lincoln Mine Operating Company, as plaintiff, in the United States District Court for the District of Idaho, Southern Division, on or about March 3, 1938, for the sum of \$6,730.70 with interest thereon from March 3, 1938, and that the said judgment is

still unpaid, subject to our rights on the appeal taken by us from said judgment and now pending in said court.

. Very truly yours,

[Corporate Seal] HURON HOLDING
CORPORATION,

(Sgd) LESTER R. BESSELL,
Vice President and
Assistant Treasurer.

Attest:

(Sgd) CHAS. M. CLOSE,
Secretary. [35]

Office of the Sheriff of the County of New York
31 Chambers Street

Nature of Process—Attachment

Manufacturers Trust Co., Plaintiff,

vs.

Lincoln Mine Operating Co.; Defendant. .

New York, March 1, 1939

Received from Huron Holding Corp., Four Thousand eight hundred five-55/100 Dollars, in the above-entitled action, as per itemized statement hereon.

DANIEL E. FINN, JR.,

Sheriff.

Per: WILLIAM M. POWERS,

Deputy Sheriff.

\$4,805.55

[Endorsed]: Filed March 13, 1939. [36]

[Title of District Court and Cause.]

**PARTIAL SATISFACTION OF JUDGMENT
AND FULL SATISFACTION OF ATTOR-
NEYS' LIEN THEREON.**

William H. Langroise, Sam S. Griffin, and E. H. Castlerlin, attorneys of record for the above named plaintiff, as such attorneys and for and on behalf of said plaintiff do hereby acknowledge receipt from Huron Holding Corporation, a corporation, the above named defendant, of the sum of \$2747.27 as part payment on, and partial satisfaction of, that certain judgment entered in the above entitled cause and court on March 3, 1938, for the total sum of \$6,730.70, with District Court costs of \$79.42, and costs in the United States Circuit Court of Appeals for the Ninth Circuit in the sum of \$20.00, which said judgment, costs and interest thereon to date hereof is, and said payment is applicable, as follows: [37]

Principal of Judgment.....	\$6,730.70
District Court Costs.....	79.42
Appellate Court Costs.....	20.00
6% Interest to date hereof.....	415.50
<hr/>	
Total	\$7,245.62
Paid as aforesaid.....	\$2,747.27
Balance of principal judgment and costs unsatisfied by such payment.....	\$4,498.35

And said attorneys do further hereby acknowledge receipt of said sum as applicable to, and as

payment to them in full satisfaction of their attorneys' lien against any and all moneys payable by defendant upon said judgment, which lien was filed with the Clerk of the above entitled Court upon the 27th day of January, 1939.

It is understood that the payment of the above sum in satisfaction of said attorney's lien shall not prejudice said Huron Holding Corporation, a corporation, or its surety, the National Surety Corporation, a corporation, from contending that the remainder of said judgment has been otherwise paid.

Dated this 8th day of March, 1939.

WILLIAM H. LANGROISE,

SAM S. GRIFFIN,

E. H. CASTERLIN,

By SAM S. GRIFFIN.

[Endorsed]: Filed March 13, 1939. [38]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON APPEAL
BOND AFTER REMAND.

Now comes Lincoln Mine Operating Company, a corporation, the plaintiff in the above entitled cause, and shows to this Court that Huron Holding Corporation, a corporation, the defendant therein, prayed and obtained an appeal from the final judgment in this cause to the United States Circuit Court of Appeals for the Ninth Circuit, all of

which appears from the records of this Court; that the said Huron Holding Corporation, a corporation, for the purposes of said appeal filed herein an appeal and supersedeas bond; that the National Surety Corporation, for and on behalf of the said defendant, did, on the 31st day of May, 1938, execute said appeal and supersedeas bond in the sum of Ten Thousand (\$10,000.00) Dollars, payable to the Lincoln Mine Operating Company, a corporation, and that said bond was approved by Charles C. Cavanah, United States District Judge; that the said appeal has been determined and the said judgment affirmed by the said appellate court, as shown by the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, which was filed in this Court on the 13th day of March, 1939, and which is now presented as a part of this motion;

Wherefore, plaintiff prays that in accordance with the judgment and mandate of the United States Circuit Court of Appeals for the Ninth Circuit, and pursuant to Rule 73(f) of the Federal Rules of Civil Procedure, judgment be entered herein in favor of the plaintiff and against the National Surety [39] Corporation for the amount of said judgment, to-wit: the sum of Six Thousand Seven Hundred Thirty and 70/100 Dollars (\$6,730.70) principal, and Seventy Nine and 42/100 Dollars (\$79.42) costs, with interest from the date of the rendition of said judgment in this Court, to-wit: March 3rd, 1938, and that the plaintiff do have execution therefor and any and all other or-

ders and process in aid of said judgment; and that notice of this motion be given to the said National Surety Corporation, a corporation, pursuant to said Rule 73(f) in the manner therein provided and for such time as this Court prescribed.

A copy of said bond is attached hereto and marked Exhibit "A".

WILLIAM H. LANGROISE,
SAM S. GRIFFIN,
E. H. CASTERLIN.

[Endorsed]: Filed March 14, 1939. [40]

[Title of District Court and Cause.]

ANSWER OF NATIONAL
SURETY CORPORATION

Comes now, the National Surety Corporation, a corporation, and answering the motion of the plaintiff for judgment on appeal bond after remand, admits, alleges and denies as follows:

I.

Admits that the Huron Holding Corporation, a corporation, the defendant in the above entitled cause, prayed and obtained an appeal from the final judgment in the above entitled court to the United States Circuit Court of Appeals for the Ninth Circuit, and that the said Huron Holding Corporation, a corporation, for the purposes of said appeal filed in this action an appeal and supersedeas bond. That

the said National Surety Corporation, for and on behalf of the said defendant, did on the 31st day of May, 1938, execute said appeal and supersedeas bond in the sum of [44] \$10,000.00, payable under the terms and conditions set forth in said bond, a copy of which is attached to said motion, and that the said bond was approved by Charles C. Cavanah, United States District Judge.

II.

Admits that the said appeal has been determined and the said judgment affirmed by said appellate court as shown by the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, which was filed in this court on the 13th day of March, 1939.

Further answering said motion, the said National Surety Corporation, a corporation, alleges that the said judgment obtained by the Lincoln Mine Operating Company against the Huron Holding Corporation, a corporation, was paid in the following manner:

(a) That on the 13th day of March, 1939, the Huron Holding Corporation, a corporation, paid to the said plaintiff and its attorneys the sum of \$2,747.28, the same being payment and satisfaction of a certain attorneys' lien that had been filed by the attorneys for the above named plaintiff, and the said Huron Holding Corporation, a corporation, took and received from the attorneys for said plaintiff a partial satisfaction of said judgment and a full

satisfaction of their lien for attorneys' fees and expenses, which said satisfaction was filed in the above entitled court on the 13th day of March, 1939, and is now a part of the records and files in the above entitled cause, and to which said partial satisfaction reference is hereby made. [45]

(b) That all the rest and residue and remainder of said judgment was paid by the said Huron Holding Corporation upon the 3rd day of March, 1939, when it paid the sum of \$,805.55 to the Sheriff of New York County, State of New York, as garnishee in an action brought in the Supreme Court of the State of New York for New York County, entitled Manufacturers Trust Company, a corporation, plaintiff, vs. Lincoln Mine Operating Company, a corporation, defendant. That the facts concerning said action and said payment are as follows:

1. That on or about the 29th day of June, 1938, the said Manufacturers Trust Company filed an action against the Lincoln Mine Operating Company, the judgment creditor herein, in the Supreme Court of the State of New York, for the County of New York, and caused a warrant of attachment to be issued against any property found in New York County belonging to the said Lincoln Mine Operating Company; that the situs of the judgment obtained in the above entitled cause was in the State of New York by reason of the fact that the judgment creditor, the Huron Holding Corporation, was a citizen and resident of the State of New York.

2. That said warrant of attachment was served upon the Huron Holding Corporation, a corporation, by the Sheriff of New York County on or about the 12th day of July, 1938, and that the said Sheriff by said warrant of attachment attached the said judgment which was entered in this court against the defendant herein, Huron Holding Corporation, a corporation, upon the 3rd day of March, 1938, in the amount of \$6,730.70. [46]

3. That the said Huron Holding Corporation, pursuant to said writ of attachment, on or about the 15th day of July, 1938, executed and delivered to said Sheriff its certificate specifying the indebtedness owing by it to said Lincoln Mine Operating Company upon said judgment.

4. That the said Sheriff of New York County on July 19, 1938, duly filed his report and appraisal of said property so attached.

5. That the said plaintiff herein, Lincoln Mine Operating Company, was duly served with process in the said case pending in the State of New York on July 18, 1938.

6. That the said Lincoln Mine Operating Company, a corporation, the defendant in the New York action, defaulted and failed to appear in the New York court in said cause.

7. That on February 25, 1939, a judgment was recovered in said New York action against the said Lincoln Mine Operating Company in the total amount of \$15,842.02.

8. That thereafter an execution upon said judgment was had against the property attached, to-wit:

The judgment held against the Huren Holding Corporation by the Lincoln Mine Operating Company entered in this court on the 3rd day of March, 1938.

9. That the said Sheriff of New York County, by virtue of said warrant of attachment, judgment and execution on or about the 1st day of March, 1939, collected and received from the Huron Holding Corporation the sum of \$4,805.55. [47]

(c) That the said Huron Holding Corporation, a corporation, the defendant in the above entitled action, did on the 13th day of March, 1939, file in the above entitled cause a motion to have the court make and enter an order satisfying the judgment in the above entitled cause, and did attach to said motion the affidavit of Leonard G. Bisco, to which affidavit was also attached a certified copy of the judgment roll in the case of Manufacturers Trust Company, a corporation, plaintiff, vs. Lincoln Mine Operating Company, a corporation, defendant, which said judgment roll was a true and correct transcript, duly certified to, of the proceedings in said cause in the Supreme Court of New York for New York County. That also attached to said affidavit of Leonard G. Bisco and marked Exhibit B was a certified copy of the warrant of attachment, and there was also attached to said affidavit of Leonard G. Bisco a certified copy of the inventory of attached property which is marked Exhibit C.

That there is also attached to the said motion of the Huron Holding Corporation filed in the above entitled court on the 13th day of March, 1939, the affidavit of William L. Schneider, to which is attached copies of the following named papers in the case pending in the Supreme Court of New York for the County of New York, entitled Manufacturers Trust Company, plaintiff; vs. Lincoln Mine Operating Company, defendant, said papers being marked as follows:

Exhibit A: Copy of summons and complaint.

Exhibit B: Copy of warrant of attachment and affidavit in aid thereof.

Exhibit C: Copy of affidavit which shows service upon the Lincoln Mine Operating Company. [48]

Exhibit D: Copy of transcript of judgment entered in said Supreme Court of New York, County of New York, in said cause.

That there is also attached to said motion for satisfaction of judgment, which said motion was filed on the 13th day of March, 1939, as Exhibit 3, the affidavit of Lester R. Bessell, the Vice-President and Assistant-Treasurer of the Huron Holding Corporation, a corporation, which affidavit shows the attachment of \$6,730.70 with interest thereon from March 3, 1938, the same being the amount of the judgment obtained in this court against the said Huron Holding Corporation, and that to the said affidavit of Lester R. Bessell is attached the receipt of John T. Higgins, Sheriff of New York County, State of New York, showing the payment by said

Huron Holding Corporation to said Sheriff in said cause of the amount of \$4,805.55.

(d) That the said payment by said Huron Holding Corporation of said \$4,805.55 as shown by the said affidavits and exhibits attached to said motion, and the payment of said \$2,747.28 more than exceeds the total amount of principal and interest due on the said judgment obtained by the plaintiff herein against said Huron Holding Corporation.

(e) That this answering surety corporation hereby refers to and incorporates herein by this reference all of the papers referred to and filed herein as a part of the motion of the said Huron Holding Corporation to have said judgment satisfied, and particularly hereby refers to and by this reference incorporates herein the affidavit of Leonard G. Bisco and the exhibits attached to said affidavit, and hereby refers to and incorporates herein the affidavit of William L. Schneider and the exhibits attached thereto, and [49] also the affidavit of Lester R. Bessell and the exhibits attached thereto, and hereby incorporates herein by this reference the affidavit of Oscar W. Worthwine filed in connection with the said motion of Huron Holding Corporation to satisfy said judgment, and hereby by this reference incorporates herein the partial satisfaction of judgment and full satisfaction of attorneys' lien filed herein on March 13, 1939, by the attorneys for the plaintiff herein, Lincoln Mine Operating Company, a corporation.

Wherefore, said National Surety Corporation, having fully answered the motion of the said plaintiff, Lincoln Mine Operating Company, a corporation, prays that the court make and enter an order herein satisfying the judgment obtained by the Lincoln Mine Operating Company, a corporation, against the Huron Holding Corporation, a corporation, on the 3rd day of March, 1938, and for such other and further relief as to the court seems meet and just in the premises.

JESS HAWLEY,
OSCAR W. WORTHWINE,
HAWLEY & WORTHWINE,

Residence: Boise, Idaho,
Attorneys for National
Surety Corporation.

(Duly verified.)

[Endorsed]: Filed March 22, 1939. [50]

[Title of District Court and Cause.]

AMENDMENT TO MOTION FOR SATISFAC-
TION OF JUDGMENT.

Comes now, the defendant, Huron Holding Corporation, and after leave of court first had and obtained, does hereby amend its motion for satisfaction of judgment filed in the above entitled court and cause by adding thereto as paragraph III the following:

“III.

That the promissory note on which the Manufacturers Trust Company obtained judgment against the Lincoln Mine Operating Company, as hereinbefore detailed, was under and by virtue of the laws of the State of Idaho outlawed and subject to the plea of the statute of limitations as provided by Section 5-201 I. C. A.:

“Civil actions can only be commenced within the periods prescribed in this chapter after the cause of action shall have accrued, except when, in special cases, a different limitation is prescribed by statute.” [51]

And the related statute, Section 5-216 I. C. A.:

“Action on written contract.—Within five years:

“An action upon any contract, obligation or liability founded upon an instrument in writing.”

And that said promissory note was due on June 14, 1929, under the statutes and decisions of the State of Idaho, and therefore an action could not have been successfully maintained by the Manufacturers Trust Company against the defendant in a state court of the State of Idaho or in the United States District Court of the State of Idaho, and no judgment could have been obtained, and it was without remedy for the recovery of the indebtedness represented by the said promissory note excepting by the action brought in the State of New York and

upon which judgment was therein obtained as herein set forth."

JESS HAWLEY,
OSCAR W. WORTHWINE,
HAWLEY & WORTHWINE,

Residence: Boise, Idaho,
Attorneys for Defendant.

[Endorsed]: Filed March 29, 1939. [52]

[Title of District Court and Cause.]

**AMENDMENT TO ANSWER OF NATIONAL
SURETY CORPORATION**

Comes now, the National Surety Corporation, a corporation, and after leave of court first had and obtained, does hereby amend its answer filed in the above entitled court and cause by adding thereto as paragraph III the following:

"III.

That the promissory note on which the Manufacturers Trust Company obtained judgment against the Lincoln Mine Operating Company, as hereinbefore detailed, was under and by virtue of the laws of the State of Idaho outlawed and subject to the plea of the statute of limitations as provided by Section 5-201 I. C. A.:

"Civil actions can only be commenced within the periods prescribed in this chapter after the cause of action shall have accrued, except

when, in special cases, a different limitation is prescribed by statute." [53]

And the related statute, Section 5-216 I. C. A.:

"Action on written contract.—Within five years:

"An action upon any contract, obligation or liability founded upon an instrument in writing."

And that said promissory note was due on June 14, 1929, under the statutes and decisions of the State of Idaho, and therefore an action could not have been successfully maintained by the Manufacturers Trust Company against the defendant in a state court of the State of Idaho or in the United States District Court of the State of Idaho, and no judgment could have been obtained, and it was without remedy for the recovery of the indebtedness represented by the said promissory note excepting by the action brought in the State of New York and upon which judgment was therein obtained as herein set forth."

JESS HAWLEY
OSCAR W. WORTHWINE
HAWLEY & WORTHWINE

Residence: Boise, Idaho.
Attorneys for National Surety
Corporation.

(Service accepted.)

[Endorsed]: Filed March 29, 1939. [54]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW ON MOTION FOR JUDGMENT
AGAINST NATIONAL SURETY CORPO-
RATION.

A motion for judgment against the National Surety Corporation, the surety on the supersedeas bond on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, having been duly filed in the above entitled Court and cause, and the National Surety Corporation having filed an answer to said motion, the matter came regularly on for hearing before the Court and the Judge thereof in open Court at Pocatello, Idaho, on the 21st day of March, 1939, the plaintiff being represented by its counsel, E. H. Casterlin, Esquire, and the National Surety Corporation being represented by its counsel, Jess Hawley, Esquire. The cause was heard on the pleading and documentary evidence and submitted to the Court for decision and now, being duly advised as to the law and the facts, the Court finds as follows:

I.

That the Huron Holding Corporation, a corporation, the defendant, prayed and obtained an appeal from the final judgment in this cause to the United States Circuit Court of Appeals for the Ninth Circuit, all of which appears from the records of this Court; that the said Huron Holding Corporation, a corporation, for the purposes of

said appeal filed herein an appeal and supersedeas bond; that the National Surety Corporation, for and on behalf of the said defendant, did, on the 31st day of May, 1938, execute said appeal and supersedeas bond in the sum of Ten Thousand (\$10,000.00) Dollars, payable to the Lincoln Mine Operating Company, a corporation, and that said bond was approved by Charles C. Cavanah, United States District Judge; that the said appeal has been determined and the said judgment affirmed by the said appellate court, as shown by the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, which was filed in this Court on the 13th day of March, 1939, and which is now presented as a part of said motion.

II.

That on the 13th day of March, 1939, the Huron Holding Corporation, a corporation, paid to the said plaintiff and its attorneys [63] the sum of \$2,747.28, the same being payment and satisfaction of a certain attorneys' lien that had been filed by the attorneys for the above named plaintiff, and the said Huron Holding Corporation, a corporation, took and received from the attorneys for said plaintiff a partial satisfaction of said judgment and a full satisfaction of their lien for attorneys' fees and expenses, which said satisfaction was filed in the above entitled Court on the 13th day of March, 1939, and is now a part of the records and files in the above entitled cause;

That all the rest and residue and remainder of said judgment was paid by the said Huron Holding Corporation upon the 3rd day of March, 1939, when it paid the sum of \$4,805.55 to the Sheriff of New York County, State of New York, as garnishee in an action brought in the Supreme Court of the State of New York for New York County, entitled Manufacturers Trust Company, a corporation, plaintiff, vs. Lincoln Mine Operating Company, a corporation, defendant. That the facts concerning said action and said payment are as follows:

1. That on or about the 29th day of June, 1938, the said Manufacturers Trust Company filed an action against the Lincoln Mine Operating Company, the judgment creditor herein, in the Supreme Court of the State of New York, for the County of New York, and caused a warrant of attachment to be issued against any property found in New York County belonging to the said Lincoln Mine Operating Company; that the situs of the judgment obtained in the above entitled cause was in the State of New York by reason of the fact that the judgment creditor, the Huron Holding Corporation, was a citizen and resident of the State of New York, and the Supreme Court of the State of New York, County of New York, secured jurisdiction in the case of the Manufacturers Trust Company, plaintiff, against Lincoln Mine Operating Company, defendant.

2. That said warrant of attachment was served upon the Huron Holding Corporation, a corporation, by the Sheriff of New York County on or about the 12th day of July, 1938, and that the said Sheriff by said warrant of attachment attached the said judgment which was entered in this court against the defendant herein, Huron Holding Corporation, a corporation, upon the 3rd day of March, 1938, in the amount of \$6,730.70. [64]

3. That the said Huron Holding Corporation, pursuant to said writ of attachment, on or about the 15th day of July, 1938, executed and delivered to said Sheriff its certificate specifying the indebtedness owing by it to said Lincoln Mine Operating Company upon said judgment.

4. That the said Sheriff of New York County on July 19, 1938, duly filed his report and appraisal of said property so attached.

5. That on June 28, 1938, summons was issued in the above entitled action brought by the Manufacturers Trust Company, plaintiff, against Lincoln Mine Operating Company, defendant, and the same was served by Marvin E. Wright, Deputy Sheriff of Ada County, State of Idaho, on July 18, 1938, at the Owyhee Hotel in Boise, Ada County, State of Idaho, on defendant Lincoln Mine Operating Company, an Idaho corporation, by delivering to and leaving a true copy of said summons with William I. Phillips, President of said Lincoln Mine Operating Company.

6. That the said Lincoln Mine Operating Company, a corporation, the defendant in the New York action, defaulted and failed to appear in the New York Court in said cause.

7. That on February 25, 1939, a judgment was recovered in said New York Action against the said Lincoln Mine Operating Company in the total amount of \$15,842.02.

8. That thereafter an execution upon said judgment was had against the property attached, to-wit:

The judgment held against the Huron Holding Corporation by the Lincoln Mine Operating Company entered in this court on the 3rd day of March, 1938.

9. That the said Sheriff of New York County, by virtue of said warrant of attachment, judgment and execution on or about the 1st day of March, 1939, collected and received from the Huron Holding Corporation the sum of \$4,805.55.

That the said Huron Holding Corporation, a corporation, the defendant in the above entitled action, did on the 13th day of March, 1939, file in the above entitled cause a motion to have the Court make and enter an order satisfying the judgment in the above entitled cause, and did attach to the said motion the [65] affidavit of Leonard G. Bisco, to which affidavit was also attached a certified copy of the judgment roll in the case of Manufacturers Trust Company, a corporation, plaintiff, vs. Lincoln

Mine Operating Company, a corporation, defendant, which said judgment roll was a true and correct transcript duly certified to, of the proceedings in said cause in the Supreme Court of New York for New York County. That also attached to said affidavit of Leonard G. Bisco and marked Exhibit B was a certified copy of the warrant of attachment, and there was also attached to said affidavit of Leonard G. Bisco a certified copy of the inventory of attached property which is marked Exhibit C.

That there is also attached to the said motion of the Huron Holding Corporation filed in the above entitled Court on the 13th day of March, 1939, the affidavit of William L. Schneider, to which is attached copies of the following named papers in the case pending in the Supreme Court of New York, County of New York, entitled Manufacturers Trust Company, plaintiff, vs. Lincoln Mine Operating Company, defendant, said papers being marked as follows:

Exhibit A: Copy of summons and complaint.

Exhibit B: Copy of warrant of attachment and affidavit in aid thereof.

Exhibit C: Copy of affidavit which shows service upon the Lincoln Mine Operating Company.

Exhibit D: Copy of transcript of judgment entered in said Supreme Court of New York, County New York in said cause.

That there is also attached to said motion for satisfaction of judgment, which said motion was filed on the 13th day of March, 1939, as Exhibit 3, the affidavit of Lester R. Bessell, the Vice-President and Assistant Treasurer of the Huron Holding Corporation, a corporation, which affidavit shows the attachment of \$6,730.70 with interest thereon from March 3, 1938, the same being the amount of the judgment obtained in this court against the said Huron Holding Corporation, and that to the said affidavit of Lester R. Bessell is attached the receipt of John T. Higgins, Sheriff of New York County, State of New York, showing the payment by said Huron Holding Corporation to said Sheriff in said cause of the amount of \$4,805.55; that the facts stated in said affidavits are true. [66]

That the said payment by said Huron Holding Corporation of said \$4,805.55 as shown by the said affidavits and exhibits attached to said motion, and the payment of said \$2,747.28 more than exceeds the total amount of principal and interest due on the said judgment obtained by the plaintiff herein against said Huron Holding Corporation, and the said payments made by the said defendant are not voluntary and were binding upon the Lincoln Mine Operating Company and were in full satisfaction of said judgment of this Court.

III.

That there was filed in the above entitled Court and cause a motion by the defendant, Huron Hold-

ing Corporation, to have said judgment satisfied and all of the papers referred to and filed in this Court and cause as a part of the said motion were specifically referred to and incorporated in the answer of the National Surety Corporation, and, furthermore, for the purpose of the hearing the said motion of the defendant, Huron Holding Corporation, was united and joined with the hearing of this motion for judgment against the National Surety Corporation, and the evidence introduced in each hearing was stipulated and agreed as part of the record to be considered in connection with the other motion and so have been considered by the Court.

CONCLUSIONS OF LAW

As Conclusions of Law from the foregoing Findings of Fact, the Court concludes:

1. That the judgment of the plaintiff against the defendant has been fully paid and satisfied by the defendant, Huron Holding Corporation.
2. That the National Surety Corporation is under no liability to the plaintiff corporation by reason of the supersedeas bond by it given, executed and filed on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause.
3. That the said motion for judgment on said appeal bond made by the said plaintiff should be and hereby is denied.

Dated this 4th day of May, 1939.

CHARLES C. CAVANAH

United States District Judge.

[Endorsed]: Filed May 4, 1939. [67]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW ON DEFENDANT'S MOTION FOR
SATISFACTION OF JUDGMENT

The defendant, Huron Holding Corporation, having filed its motion for satisfaction of judgment in the above entitled Court and cause, and the plaintiff, Lincoln Mine Operating Company, having filed its answer thereto, and a hearing on the said motion having been regularly had before the Court in Pocatello, Idaho, on the 21st day of March, 1939, the defendant being represented by its counsel, Jess Hawley, Esquire, and the plaintiff being represented by its counsel, E. H. Casterlin, Esquire, and evidence having been introduced and the matter being finally submitted to the Court, and the Court, being fully advised as to the law and the facts, does now find as follows:

I.

That the said defendant, Huron Holding Corporation, a corporation organized and existing under the laws of the State of New York, has paid the sum of \$4,805.55 upon said judgment; that said

sum was paid by said defendant upon said judgment upon about the first day of March, 1939, under a levy and warrant of attachment issued out of the Supreme Court of the State of New York, County of New York, in the case of Manufacturers Trust Company, a corporation, plaintiff, vs. Lincoln Mine Operating Company, a corporation, defendant, which case is pending in the Supreme Court of the State of New York, for the County of New York, and in which said cause the following proceedings were had:

(a) That on or about the 29th day of June, 1938, the said Manufacturers Trust Company filed an action against the Lincoln Mine Operating Company, the judgment creditor herein, in the Supreme Court of the State of New York, for the County of New York, and caused a warrant of attachment to be issued against any property found in New York County belonging to the said Lincoln Mine Operating Company; that the situs of the judgment obtained in the above entitled cause was in the State of New York by reason of the fact that the judgment creditor, [68] the Huron Holding Corporation, was a citizen and resident of the State of New York, and the Supreme Court of the State of New York, County of New York, secured jurisdiction in the case of Manufacturers Trust Company, plaintiff, against Lincoln Mine Operating Company, defendant.

(b) That said warrant of attachment was served upon the Huron Holding Corporation, a corpora-

tion, by the Sheriff of New York County on or about the 12th day of July, 1938, and that the said Sheriff by said warrant of attachment attached the said judgment which was entered in this court against the defendant herein, Huron Holding Corporation, a corporation, upon the 3rd day of March, 1938, in the amount of \$6,730.70.

(c) That the said Huron Holding Corporation, pursuant to said writ of attachment, on or about the 15th day of July, 1938, executed and delivered to said Sheriff its certificate specifying the indebtedness owing by it to said Lincoln Mine Operating Company upon said judgment.

(d) That the said Sheriff of New York County on July 19, 1938, duly filed his report and appraisal of said property so attached.

(e) That on June 28, 1938, summons was issued in the above entitled action brought by the Manufacturers Trust Company, plaintiff, against Lincoln Mine Operating Company, defendant, and the same was served by Marvin E. Wright, Deputy Sheriff of Ada County, State of Idaho, on July 18, 1938, at the Owyhee Hotel in Boise, Ada County, State of Idaho, on defendant Lincoln Mine Operating Company, an Idaho corporation, by delivering to and leaving a true copy of said summons with William I. Phillips, President of said Lincoln Mine Operating Company.

(f) That the said Lincoln Mine Operating Company, a corporation, the defendant in the New York

action, defaulted and failed to appear in the New York court in said cause.

(g) That on February 25, 1939, a judgment was recovered in said New York action against the said Lincoln Mine Operating Company in the total amount of \$15,842.02. [69]

(h) That thereafter an execution upon said judgment was had against the property attached, to-wit:

The judgment held against the Huron Holding Corporation by the Lincoln Mine Operating Company entered in this court on the 3rd day of March, 1938.

(i) That the said Sheriff of New York County, by virtue of said warrant of attachment, judgment and execution, on or about the first day of March, 1939, collected and received from the Huron Holding Corporation the sum of \$4,805.55, which is the amount of the judgment obtained in this court, together with interest and costs, less one-third thereof, which said one-third is claimed by the attorneys for the plaintiff, Lincoln Mine Operating Company, as attorneys' fees by virtue of a lien filed by them on the judgment in the above entitled Court.

(j) That the said Sheriff of New York County has paid to the Manufacturers Trust Company the amount so collected by him, less his legal fee and expenses, to-wit, the sum of \$4,612.42, which amount the Manufacturers Trust Company has applied upon the judgment entered and recovered by it in

the Supreme Court of New York for New York County against the Lincoln Mine Operating Company.

II.

That on or about the 27th day of January, 1939, W. H. Langroise, Sam S. Griffin, and E. H. Casterlin, attorneys for the Lincoln Mine Operating Company, a corporation, the plaintiff in this action, served upon the Huron Holding Corporation, a corporation, and the National Surety Corporation, a corporation, as surety upon a supersedeas bond in the above entitled action, and filed in the above entitled court a notice of attorneys' lien wherein said attorneys claimed a lien for their services upon the cause of action of the plaintiff in the above entitled action and any judgment rendered therein for the agreed sum of $33\frac{1}{3}\%$ of the recovery in said action, either in money or in property, together with costs and expenses due such attorneys in said cause or connected therewith, and that said attorneys claim that they have \$367.23 due them from the said plaintiff as costs and expenses in the prosecution of said action. That one-third of said judgment with interest thereon amounts to the sum of \$2,380.05. That the said defendant herein, Huron Holding Corporation, [70] has paid to said William H. Langroise, Sam S. Griffin and E. H. Casterlin, the said sum of \$2,380.05, and in addition to the payment of said sum has paid to said attorneys on their claim for costs and expenses the said further

sum of \$367.23, or a total of \$2,747.28, and the said attorneys have satisfied their lien claim by written satisfaction filed in the above entitled cause, which written satisfaction shows the payment to said attorneys of the said sum of \$2,747.28.

III.

That the exhibits attached to the motion of the defendant for satisfaction of judgment are duly certified according to law and the rules of this Court; that the Supreme Court of the State of New York, County of New York, had jurisdiction and its proceedings, as heretofore set forth, were within its jurisdiction and valid and are entitled to full faith and credit; that the matters of fact set forth in the exhibits and affidavits of the defendant are true.

IV.

That the payments made by the said defendant were not voluntary and were binding upon the Lincoln Mine Operating Company and were in satisfaction of the judgment of this Court.

V.

That payment has been made in full of the judgment obtained by the plaintiff, Lincoln Mine Operating Company, against the defendant, Huron Holding Corporation, in the manner above stated.

VI.

That there was filed in the above entitled Court and cause a motion by the plaintiff, Lincoln Mine

Operating Company, to have judgment entered against the National Surety Corporation, and for the purpose of the hearing the said motion for judgment against the National Surety Corporation was united and joined with the defendant's motion for satisfaction of judgment, and the evidence introduced in each hearing was stipulated and agreed as part of the record to be considered in connection with the other motion and so has been considered by the Court. [71]

CONCLUSIONS OF LAW

As Conclusions of Law from the foregoing Findings of Fact, the Court concludes:

1. That the judgment of this Court entered on the 3rd day of March, 1938, and affirmed by the Circuit Court of Appeals of the Ninth Circuit, has been fully paid and satisfied by the defendant, Huron Holding Corporation.

2. That the said defendant is entitled to have the said judgment satisfied in full and to have the judgment and order of this Court to that effect.

Dated this 4th day of May, 1939.

CHARLES C. CAVANAH

United States District Judge.

[Endorsed]: Filed May 4, 1939. [72]

[Title of District Court and Cause.]

**JUDGMENT AND ORDER ON MOTION FOR
JUDGMENT AGAINST NATIONAL SURE-
TY CORPORATION**

The motion of the plaintiff, Lincoln Mine Operating Company, a corporation, for judgment against the National Surety Corporation, a corporation, having been filed in the above entitled Court and cause and having been heard and considered, and Findings of Fact and Conclusions of Law having been made, entered and filed in the matter;

Now, therefore, it is hereby ordered, adjudged and decreed that the said motion be denied and that the plaintiff take nothing by reason thereof.

Dated this 4th day of May, 1939.

CHARLES C. CAVANAH

United States District Judge.

[Endorsed]: Filed May 4, 1939. [73]

[Title of District Court and Cause.]

**JUDGMENT ON DEFENDANT'S MOTION
FOR SATISFACTION OF JUDGMENT.**

The defendant, Huron Holding Corporation, having heretofore filed its motion for satisfaction of judgment in the above entitled Court and cause, and the matter having been heard, and Findings of Fact and Conclusions of Law having been made, entered and filed:

Now, therefore, it is hereby ordered, adjudged and decreed that the judgment entered in the above entitled Court and cause on March 3, 1938, in favor of the plaintiff, Lincoln Mine Operating Company, a corporation, and against the defendant, Huron Holding Corporation, a corporation, is fully paid and satisfied, and the Clerk of this Court is hereby ordered to make and enter a satisfaction and release in full of said judgment upon the records of this Court.

Dated this 4th day of March, 1939.

CHARLES C. CAVANAH

United States District Judge.

[Endorsed]: Filed May 4, 1939. [74]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Lincoln Mine Operating Company, a corporation, the above named plaintiff, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain Judgment on Defendant's Motion for Satisfaction of Judgment, made and entered in this action on May 4th, 1939, and from that certain Judgment and Order on Motion for Judgment against National Surety Corporation, made and entered herein on May 4th, 1939, and from the whole of the said respective judgments and orders.

Dated August 3, 1939.

WILLIAM H. LANGROISE

SAM S. GRIFFIN

ERLE H. CASTERLIN

Attorneys for Plaintiff.

Residences: Boise, Idaho.

(Service by copy of Notice of Appeal mailed to Messrs. Hawley and Worthwine on July 3, 1939.)

[Endorsed]: Filed August 3, 1939. [75]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRAN-
SCRIPT OF RECORD

United States of America,
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 85, inclusive, to be a full, true and correct copy of so much of the records, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein in the United States Circuit Court in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the

appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify, that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$13.60, and that the same have been paid in full by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 21st day of August, 1939.

[Seal]

W. D. McREYNOLDS,

Clerk. [85]

[Endorsed]: No. 9285. United States Circuit Court of Appeals for the Ninth Circuit. Lincoln Mine Operating Company, a corporation, Appellant, vs. Huron Holding Corporation, a corporation, and National Surety Corporation, a corporation, Appellees. Transcript of Record Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Filed September 5, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 9285

LINCOLN MINE OPERATING COMPANY, a
corporation,

Appellant,

vs.

HURON HOLDING CORPORATION, a corpora-
tion, and NATIONAL SURETY CORPORA-
TION,

Appellees.

STATEMENT OF POINTS UNDER RULE 19

Comes now the above named appellant and files
its statement of points on which it will rely on the
appeal in this matter.

1.

The court erred in the Findings of Fact and Con-
clusions of Law entered on Motion for Satisfaction
of Judgment in the following respects:

(a) By finding that the Huron Holding Corpo-
ration has paid \$4805.55, or any sum, on the judg-
ment of March 3, 1938, under attachment proceed-
ings in the Supreme Court of New York.

(b) By finding that the situs of the judgment
of March 3, 1938, made and entered by the court
below was in the state of New York.

(c) By finding that the Supreme Court of New
York acquired jurisdiction of the Lincoln Mine Op-

erating Company in the action brought against it by the Manufacturers Trust Company.

(d) By finding that the sheriff in New York attached the judgment of the court below entered March 3, 1938, in the action commenced in the Supreme Court of the State of New York by the Manufacturers Trust Company against the Lincoln Mine Operating Company.

(e) By finding that the Supreme Court of the State of New York acquired jurisdiction of the cause of action brought by the Manufacturers Trust Company against the Lincoln Mine Operating Company.

(f) By finding that the payment made by the Huron Holding Corporation to the Manufacturers Trust Company is binding upon the Lincoln Mine Operating Company and is in satisfaction of the judgment entered by the lower court.

(g) By finding that the said judgment of March 3, 1938, entered in the court below is paid in full.

(h) By concluding that the said judgment of March 3, 1938, in the court below is paid in full.

(i) By concluding that the said judgment of March 3, 1938, should be satisfied.

2.

The court erred in the Findings of Fact and Conclusions of Law entered on Motion for Judgment on appeal bend in the following respects:

(a) By finding that the judgment of March 3, 1938, of the court below was paid in part by the

Huron Holding Corporation as garnishee in the action Manufacturers Trust Company against Lincoln Mines Operating Company in the Supreme Court of the State of New York.

(b) By finding that the situs of the judgment of March 3, 1938, in the court below was in the state of New York.

(c) By finding that the Supreme Court of the State of New York gained jurisdiction of the cause Manufacturers Trust Company against Lincoln Mine Operating Company.

(d) By finding that the sheriff of New York attached the judgment of March 3, 1938, entered in the court below.

(e) By finding that a judgment was obtained in the Supreme Court of the State of New York against the Lincoln Mine Operating Company.

(f) By finding that all of the matters stated in the affidavits attached to the Motion to Satisfy Judgment in the court below, in respect of attachment and execution, are true, so far as the affidavits certified to this Court are concerned.

(g) By finding that the payment made by the Huron Holding Corporation to the Manufacturers Trust Company is in satisfaction of the judgment of March 3, 1938, entered in the court below, and binding on the Lincoln Mine Operating Company.

(h) By concluding that the judgment of March 3, 1938, of the court below is fully paid.

(i) By concluding that the National Surety Corporation is not liable on its supersedeas bond filed in the court below.

3.

That both judgments entered in the court below on May 24th, 1939, on the motions designated in Paragraphs 1 and 2 above are contrary to law.

4.

That the evidence is wholly insufficient to sustain the respective Findings of Fact and Conclusions of Law and to support the respective judgments, in the following respects:

(a) The evidence does not show that the Supreme Court of the State of New York acquired jurisdiction over the judgment of March 3, 1938, entered in the court below, by attachment proceedings or otherwise.

(b) The evidence does not show that the situs of the judgment of the court below was or is in the state of New York.

(c) The evidence does not show that the Supreme Court of the State of New York acquired jurisdiction of the Lincoln Mine Operating Company.

(d) The evidence does not show that the judgment of March 3, 1938, entered in the court below has been paid to any extent over and above the amount specified in the satisfaction of attorneys' lien.

(e) The evidence conclusively show the contrary of (a), (b), (c) and (d) last above.

DESIGNATION

That part of the record necessary for the consideration of the foregoing are: pages refer to clerk's certified record,

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WILLIAM H. LANGROISE,

SAM S. GRIFFIN,

ERLE H. CASTERLIN,

Attorneys for Appellant.

Residence and Post Office:

Boise, Idaho.

Service of the foregoing and receipt of copy this
6th day of September, 1939, is hereby acknowledged.

JESS HAWLEY,

OSCAR W. WORTHWINE,

Attorney for both Appellees.

Residence and Post Office:

Boise, Idaho.

[Endorsed]: Filed Sept. 8, 1939.

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No. 9285

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LINCOLN MINE OPERATING COMPANY,
a corporation,

Appellant,

vs.

**HURON HOLDING CORPORATION, a corpo-
ration, and NATIONAL SURETY COR-
PORATION, a corporation,**

Appellees.

**Upon Appeal from the District Court of the United
States for the District of Idaho,
Southern Division**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

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United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, February
23, 1940.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal in above cause argued by Mr.
Sam S. Griffin, counsel for appellant, and by Mr.
Jess Hawley, counsel for appellees, and submitted
to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, April 30,
1940.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF
JUDGMENT.

By direction of the Court, Ordered that the type-
written opinion this day rendered by this court in
above cause be forthwith filed by the clerk, and that
a judgment be filed and recorded in the minutes of
this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the
United States for the District of Idaho, South-
ern Division.

OPINION

Before: Denman, Mathews and Healy,
Circuit Judges.

Denman, Circuit Judge:

This is an appeal from two judgments of the United States District Court for the District of Idaho, Southern Division, both rendered after our affirmance of a judgment of the district court entered by it on March 3, 1938, in favor of appellant, in which were liquidated the damages in an action for claim and delivery. One of the judgments now appealed from is in favor of appellee Huron Holding Corporation, a New York corporation, hereafter called Huron, adjudging as paid and satisfied the judgment of March 3, 1938, against Huron and in favor of appellant Lincoln Mine Operating Company, an Idaho corporation, hereafter called Lincoln. The other judgment appealed from is one denying Lincoln's motion for judgment against appellee National Surety Corporation, on its undertaking given for a supersedeas on Huron's unsuccessful appeal from the judgment of March 3, 1938.

The district court held satisfied its judgment of March 3, 1938, because of a payment by Huron to a third party claimed to have a lien on the judgment created under an attachment process of a

New York court. Hence, the district court denied a motion for execution against Huron and for a judgment against the Surety Corporation on its supersedeas undertaking.

Lincoln contends the district court erred in holding that a purported New York state court attachment of a judgment of a United States court, pending appeal thereon, can deprive the federal court either (a) of its right to cause execution thereon after affirmance or (b) of the right to grant the further relief of a summary judgment on the undertaking given for a supersedeas. Lincoln further contends that the New York attachment is invalid because (a) a foreign judgment while on appeal is not attachable under the laws of New York and (b) on appeal, a judgment based on a tort claim ceases to be a final judgment merging the unliquidated damages into a judgment debt and, hence, is not attachable under the New York law. Our disposition of the first contention makes it unnecessary to consider the others.

Our affirmance* in Huron's appeal to this court from the judgment of March 3, 1938, was on February 7, 1939. Our mandate commanding execution of the judgment and other further proceedings in the district court was filed in the district court on March 13, 1939. Under Idaho law, Lincoln's attorneys were entitled to a lien on Lincoln's judgment for their one-third contingent fee and costs. The

*101 F. (2d) 458.

lien was filed and Huron paid the attorneys, thus satisfying the judgment to that extent. The contests here concern the satisfaction of a balance of \$4,805.55.

While the appeal from the district court's judgment of March 3, 1938, was pending in this court, Lincoln, on June 29, 1938, was sued in New York by Manufacturers Trust Company, a New York corporation, hereafter called Manufacturers, upon Lincoln's promissory note to Manufacturers for \$10,000 and interest. No personal service was had on Lincoln but Manufacturers published summons and served a copy of the summons and complaint on Lincoln in Idaho, and attachment process was issued and served on Huron in New York purporting to attach Lincoln's *judgment*† (not Lincoln's cause of action) of the Idaho district court against Huron. Judgment in Manufacturers New York suit against Lincoln in the sum of \$15,842.02 was rendered on February 27, 1939, that is to say, after our affirmance on appeal in the instant suit but before the filing on March 13, 1939, of our mandate to the Idaho district court for execution and other action there. The New York court's execution was issued on February 28, 1939, and on March 1, 1939, Huron paid the sheriff the \$4,805.55.

It is upon these undisputed facts that the Idaho district court held the payment by Huron to the sheriff in Manufacturers New York suit of \$4,-

†Italics are by the Court.

805.55, the unpaid balance of the judgment of March 3, 1938, completely satisfied it, and held also that it would not enter judgment for that or any amount against National Surety Corporation on its supersedeas undertaking.

So far as Lincoln's claim of the invalidity of the New York attachment of a federal or any other foreign judgment is based on the contention that a judgment of a trial court ceases to be final when on appeal, it cannot be sustained. *Deposit Bank v. Frankfort*, 191 U. S. 499, 511. Supersedeas simply stays execution of the judgment but does not change its final quality.

Neither the district court nor Huron seriously question that federal judgments, as well as the judgments of those states in which their courts cannot garnish judgments of other states, have been held not subject to garnishment in foreign jurisdictions. *Wabash Railroad Co. v. Tourville*, 179 U. S. 322, (Missouri judgment garnished in Illinois); *U. S. Shipping Board & Emergency Fleet Corp. v. Hirsh Lumber Co.*, (CA DC) 35 F. (2d) 1010, 1011, (judgment of United States district court of Florida garnished in Sup. Ct. District of Columbia); *Mack v. Winslow* (CCA-6) 59 F. 316, 319, (federal judgment garnished in state court); *Henry v. Gold Park Mining Co.* (CC Colo.) 15 F. 649, 650, (same); *Thomas v. Wooldridge* (Bradley, C. Jus.) 23 Fed. Cas. 986, 987, (same); *Franklin v. Ward* (Story, C. J.) 9 Fed. Cas. 711, (same). Cf. *Wallace v. McConnell*, 13 Peters, 136, 150, (gar-

nishment by state court of cause of action in federal court before judgment does not stay proceedings in federal court.) Freeman Judgments, 7 Ed. §622.

The district court below holds these decisions not applicable because of *Erie Railway Company v. Tompkins*, 304 U. S. 64. That decision it contends makes the validity of the attachment of the Idaho federal judgment determinable by the law of New York, which is claimed to be that the attachment is valid. That is to say, it resolves the conflict of laws controlling the two courts in favor of that of the attaching court. The Supreme Court holds the contrary.

Furthermore, *Erie Railway Company v. Tompkins*, supra, 78, plainly states that "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." Obviously, the specific question here is not one of a mere local state law but of the power of the United States district court, created and governed by acts of Congress, to issue execution to enforce its judgment or to render judgment on the supersedeas undertaking.

The appellant's judgment was not satisfied by Huron's payment to Manufacturers. The district court erred in both its judgments appealed from and they are reversed.

Reversed.

[Endorsed]: Opinion. Filed Apr. 30, 1940. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9285

LINCOLN MINE OPERATING COMPANY,
Appellant,

vs.

HURON HOLDING CORPORATION, and NA-
TIONAL SURETY CORPORATION,
Appellees.

JUDGMENT

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Southern Division and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and hereby are reversed, with costs in favor of the appellant and against the appellees.

It Is Further Ordered and Adjudged by this Court that the appellant recover against the appellees for its costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered April 30, 1940.
Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Mr. Jess Hawley, counsel for the appellee Huron Holding Corp., and good cause therefor appearing, It Is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including July 6, 1940; and in the event the petition for a writ of certiorari to be made by the appellees herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

WILLIAM DENMAN

United States Circuit Judge.

Dated: San Francisco, California, June 4, 1940.

[Endorsed]: Order, etc. Filed June 4, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES.**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-nine (79) pages, numbered from and including 1 to and including 79, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 11th day of June, 1940.

[Seal]

PAUL P. O'BRIEN,

Clerk.

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SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1104)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1940.
No. **212.**

HURON HOLDING CORPORATION, a corporation, and NATIONAL
SURETY CORPORATION, a corporation,
Petitioners,

vs.

LINCOLN MINE OPERATING COMPANY, a corporation,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT
AND BRIEF IN SUPPORT THEREOF.**

DANIEL GORDON JUDGE,
Counsel for Petitioners,
29 Broadway,
New York, N. Y.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1940.

No.

HURON HOLDING CORPORATION, a corporation, and NATIONAL
SURETY CORPORATION, a corporation,
Petitioners,

vs.

LINCOLN MINE OPERATING COMPANY, a corporation,
Respondent.

**Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the Ninth Circuit**

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Your petitioners respectfully show as follows:

STATEMENT.

This is a petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, entered April 30, 1940 (Tr. 79), which reversed two judgments of the District Court of the United States for the District of Idaho, Southern Division, each entered May 4, 1939 (Tr. 61-62).

One of the said District Court judgments granted a motion made by the petitioner, Huron Holding Corporation, for satisfaction of a judgment entered March 3,

1938 in the said District Court in favor of the respondent and against the said petitioner, in a law case for damages and costs in an Idaho statutory claim and delivery action (Tr. 1-2). The other judgment of said District Court denied the respondent's motion for judgment against the petitioner, National Surety Corporation, on the surety's supersedeas bond (Tr. 4-6), staying execution pending an appeal from the said District Court claim and delivery judgment.

THE FACTS.

On March 3, 1938, the respondent obtained a judgment against the petitioner, Huron Holding Corporation (hereinafter called "Huron") in the District Court of the United States for the District of Idaho, Southern Division (hereinafter called "District Court"), in an Idaho statutory claim and delivery action, for damages involving an unlawful detention of personal property in the amount of \$6,730.70 and \$79.42 costs (Tr. 1-2). Huron's motion for a new trial was denied on April 16, 1938 (Tr. 3), and on May 31, 1938, it appealed said judgment to the United States Circuit Court of Appeals for the Ninth Circuit (hereinafter called "Circuit Court"), pursuant to an order of the District Court allowing such appeal (Tr. 3-4). On said appeal, the necessary undertaking and supersedeas bond in the sum of \$10,000 was executed by the petitioner, National Surety Corporation (hereinafter called "Surety Company"), approved and filed on May 31, 1938 (Tr. 4-6).

On June 28, 1938, while the above appeal was pending, Manufacturers Trust Company, a New York corporation (hereinafter called "Trust Company"), commenced an action in the Supreme Court of the State of New York,

County of New York (hereinafter called "State Court"), against the respondent on an unpaid promissory note in the sum of \$10,000. The respondent being a non-resident and not doing business in New York, the Trust Company procured the issuance of a warrant of attachment on July 12, 1938 (Tr. 17-23, 24-26), pursuant to and in full accordance with the provisions of Sections 902 et seq. of the New York State Civil Practice Act, and as interpreted by the New York Courts in *Shipman Coal Co. v. Delaware & Hudson Co., et al.*, 219 App. Div. 312, 219 N. Y. S. 628, affirmed by the New York Court of Appeals in 245 N. Y. 567 (1927).

Acting upon said warrant of attachment, the Sheriff of New York County on July 12, 1938 attached the aforementioned District Court claim and delivery judgment in favor of respondent and against Huron, by serving said warrant in the City of New York upon Huron, a resident of New York, and in which State only it was doing business and had its sole assets, and which service was accompanied by an inventory and appraiser's report and return, showing the value of the property attached to be the amount of the said District Court judgment (Tr. 26-27, 29-30). On July 15, 1938, Huron filed a certificate with the Sheriff of New York County, acknowledging that it was indebted to the respondent in the amount of the said District Court judgment and that it had not as yet paid any part of said judgment (Tr. 30-31). On July 23, 1938, the summons and complaint in the State Court action was duly served upon the respondent in Boise, Ada County, State of Idaho, by the Deputy Sheriff of said Ada County (Tr. 20-21), in further pursuance of the laws of the State of New York.

On January 27, 1939, the attorneys for the respondent in the District Court action served and filed a notice of their lien in the sum of 33 $\frac{1}{3}$ % of the recovery in said ac-

tion, which was filed pursuant to the statutes of the State of Idaho (Tr. 8-9).

The respondent having defaulted in the State Court action, on motion of the Trust Company made February 25, 1939, an order was made and entered on February 27, 1939 by the State Court, granting the Trust Company a judgment against respondent in the amount of \$15,842.02, and judgment in favor of Trust Company against respondent in said sum was accordingly entered on said date (Tr. 21-23). On February 28, 1939, the Trust Company caused an execution to be issued to the Sheriff of New York County on its judgment against the respondent, and which execution was stated to be directed against the property attached by the Sheriff by virtue of the aforementioned attachment proceeding (Tr. 27-28).

On March 1, 1939, pursuant to the aforementioned warrant of attachment, judgment and execution, Huron paid to the Sheriff of New York County \$4,805.55, which sum, less Sheriff's fees, was turned over by the Sheriff to the Trust Company to apply on its judgment against respondent (Tr. 12, 29, 39). On March 8, 1939, Huron paid to the attorneys for the respondent on their aforementioned filed attorneys' lien the sum of \$2,747.27, and, in connection with such payment, the respondent's attorneys on March 13, 1939 duly filed a partial satisfaction of judgment and full satisfaction of attorneys' lien thereon (Tr. 32-33). The total of these two payments by Huron exceeded the amount of the District Court judgment obtained by respondent against Huron on March 3, 1938.

The Circuit Court affirmed the District Court claim and delivery judgment on February 7, 1939, but did not file its mandate until March 13, 1939 (Tr. 6-8).

On March 13, 1939, based upon its foregoing payments to respondent's attorneys and the Sheriff of New York County, Huron made a motion in the District Court for

the satisfaction of the judgment theretofore obtained by respondent against it on March 3, 1938 (Tr. 9-31), and to which motion an amendment was filed by Huron on March 29, 1939 (Tr. 42-44).

On March 14, 1939, respondent made a motion for judgment against the Surety Company on the appeal bond (Tr. 33-35). To the respondent's motion, the Surety Company on March 22, 1939 filed an answer in opposition (Tr. 35-42), and filed an amendment to its answer on March 29, 1939 (Tr. 44-45).

These two motions were heard together by the District Court, and on May 4, 1939, the District Court filed findings of fact and conclusions of law on each motion, and determined that by virtue of the aforementioned payments by Huron, the judgment of the respondent against Huron had been completely satisfied and there was no liability on the part of the Surety Company to respondent (Tr. 46-60). Accordingly, on May 4, 1939, the District Court made and entered a judgment denying respondent's motion for judgment against the Surety Company (Tr. 61), and on the same date, made and entered a judgment granting Huron's motion for satisfaction of judgment (Tr. 61-62), rendering an opinion reported in 27 Fed. Supp. 720. From each of said judgments, the respondent appealed to the Circuit Court on August 3, 1939 (Tr. 62-63). On the latter appeal, the Circuit Court on April 30, 1940 reversed each of the said two District Court judgments, and entered judgment accordingly (Tr. 73-79).

It is this judgment of reversal rendered by the Circuit Court on April 30, 1940 that the petitioners seek the right to review before this Court on this petition for writ of certiorari.

OPINIONS BELOW.

The opinion of the Circuit Court sought to be reviewed, dated April 30, 1940, is as yet unreported but is on pages 74 to 78 of the Transcript of Record herein. The opinion of the reversed Idaho District Court is reported in 27 Fed. Supp. 720.

BASIS FOR JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. A., Sec. 347(a)).

QUESTIONS INVOLVED.

The questions presented in this case are;

I. Was the Idaho District Court required to recognize and give effect to the attachment proceedings which concededly in all respects complied with and were fully authorized by the laws and decisions of the State of New York?

II. Has *Erie Railway Co. v. Tompkins*, 304 U. S. 64, changed the rule that a Federal judgment may not be attached in a foreign jurisdiction?

SPECIFICATION OF ERRORS TO BE URGED.

Petitioners assign as error:

1. The refusal of the Circuit Court to recognize and give effect to the attachment proceedings which complied with and were fully authorized by the laws and

decisions of the State of New York, thus subjecting Huron to liability for double payment of the same judgment.

2. The determination by the Circuit Court that the Supreme Court of the State of New York did not acquire jurisdiction of the respondent in the action brought against it by the Trust Company by virtue of the attachment proceedings in the New York State Court.

3. The determination by the Circuit Court that the decision of this Court in *Erie Railway Co. v. Tompkins*, 304 U. S. 64, is not applicable to the case at bar and did not require an upholding of the validity of the attachment of the District Court judgment.

REASONS FOR GRANTING WRIT.

The petitioners contend herein that since the New York attachment proceedings fully complied with and were in all respects authorized by the laws and decisions of the State of New York, as expounded in the New York leading case on this point, *Shipman Coal Co. v. Delaware & Hudson Co., et al.*, 219 App. Div. 312, 219 N. Y. S. 628 (1st Dept. 1927) (affirmed without opinion by the New York Court of Appeals, 245 N. Y. 567), the Idaho District Court was required to give full recognition and effect thereto.

In accordance with the decision in *Shipman Coal Co. v. Delaware & Hudson Co.*, since Huron, respondent's judgment debtor, was present in and a resident of New York and had its sole assets there, the situs of the judgment was therefore in New York and properly subject to attachment therein. The decision of the Circuit Court is not in accordance with and misinterprets the principles laid down by this Court in *Erie Railway Co. v. Tompkins*,

304 U. S. 64, which reversed the principle laid down by this Court in its earlier decision in *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865 (1842).

This Court, in *Erie Railway Co. v. Tompkins*, determined that there is no federal common law. Therefore, since there was and is no federal statute which invalidates the New York attachment provisions and decisions, the Circuit Court was in error in immunizing the District Court judgment and construing it as being untouchable in a foreign jurisdiction. The necessary effect of this is to reverse the Courts of the State of New York in the *Shipman Coal Co. v. Delaware & Hudson Co.* case, by holding that the federal judgment, without any federal statutory basis therefor, cannot be attached in a foreign jurisdiction.

Until the decision of this Court in *Erie v. Tompkins*, it had been held that a Federal judgment is not subject to garnishment or attachment in a foreign jurisdiction because the Federal Courts were not bound to recognize the decisions and interpretations of the State Courts and could proceed upon their own conception of Federal common law.

Petitioners contend that this Court in the *Erie-Tompkins* case changed that principle, so that Federal Courts are required to recognize and give effect to the attachment statutes of State Courts as well as the interpretation given those statutes by the decisions of the State Courts. Attachment of the liability evidenced by a Federal Court judgment presents no peculiar problem of Federal jurisdiction which should justify a departure from the broad principles of the *Erie-Tompkins* case. Whether the rule of that case has been correctly expounded is a question of far reaching import which can be answered only by this Court upon review of the judgment of the Circuit Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may issue out of, and under the Seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, requiring the said Circuit Court to certify and send to this Court on a day certain, therein to be designated, a full and complete transcript of the record and all proceedings in said Circuit Court in the cause entitled, "Lincoln Mine Operating Company, a corporation, Appellant, vs. Huron Holding Corporation, a corporation, and National Surety Corporation, a corporation, Appellees", to the end that said cause may be reviewed and determined by this Honorable Court, as provided by law, and that said judgment of said Circuit Court of Appeals in said cause, and every part thereof, may be reversed by this Honorable Court, and for such other relief as may be just and proper, and your petitioners will ever pray.

Dated, New York City, July 1, 1940.

HURON HOLDING CORPORATION,
a corporation, and
NATIONAL SURETY CORPORATION,
a corporation,

Petitioners,

By DANIEL GORDON JUDGE,
Counsel for Petitioners.

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IN THE
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OCTOBER TERM, 1940.

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HURON HOLDING CORPORATION, a corporation, and NATIONAL
SURETY CORPORATION, a corporation,

Petitioners,

vs.

LINCOLN MINE OPERATING COMPANY, a corporation,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI.**

Opinions of the Courts Below.

The opinion of the Circuit Court sought to be reviewed, dated April 30, 1940, is as yet unreported but is on pages 74 to 78 of the Transcript of Record herein. The opinion of the reversed Idaho District Court is reported in 27 Fed. Supp. 720.

For the sake of brevity, we refer to the preceding petition for the following:

Basis for Jurisdiction, *supra*, p. 6;

Statement, *supra*, p. 1;

The Facts, *supra*, p. 2;

Specification of Errors to be Urged, *supra*, p. 6.

The Attachment Statutes of the State of New York.

The following are the applicable statutes, in pertinent part, of the State of New York, covering attachments under the Civil Practice Act:

"Sec. 902. In what actions attachment of property may be had. A warrant of attachment against the property of one or more defendants in an action may be granted upon the application of the plaintiff, as specified in the next section, where the action is to recover a sum of money only, as a tax or as damages for one or more of the following causes:

"1. Breach of contract, express or implied, other than a contract to marry. * * *

"Sec. 903. What must be shown to procure warrant of attachment. To entitle the plaintiff to such a warrant, he must show that a cause of action specified in the last section exists against the defendant, and, if the action is to recover damages for breach of contract, that the plaintiff is entitled to recover a stated sum, over and above all counterclaims known to him. He must also show that the defendant

"1. Is either a foreign corporation or not a resident of the state. * * *

"Sec. 912. Manner of attaching property and duties of sheriff, generally. The sheriff must execute the warrant immediately, by levying upon so much of the personal and real property of the defendant, within his county, not exempt from levy and sale by virtue of an execution, as will satisfy the plaintiff's demand, with the costs and expenses * * *.

"Sec. 916. Levy upon cause of action, evidence of debt or claim to estate. The attachment may also be levied upon a cause of action arising upon contract; including a bond, promissory note, or other instrument for the payment of money only, negotiable or otherwise, whether past due or yet to become due, executed by a foreign or domestic government, state, county, public officer, association, municipal or other corporation, or by a private person, either within or without the state; which belongs to the defendant and is found within the county. * * *

"Sec. 917. Method of making levy: A levy under a warrant of attachment must be made as follows:

"3. Upon other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same; or, if it consists of a demand, other than as specified in the last subdivision, with the person against whom it exists * * *.

"Sec. 918. Certificate of defendant's interest to be furnished. Upon the application of a sheriff holding a warrant of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a certificate, under his hand, specifying the rights or number of shares of the defendant in the stock of the association or corporation, with all dividends declared or incumbrances thereon; or the amount, nature and description of the property held for the benefit of the defendant, or of the defendant's interest in

property so held, or of the debt or demand owing to the defendant, as the case requires.

"Sec. 921. Inventory. The sheriff, immediately after levying under a warrant of attachment, must make, with the assistance of two disinterested freeholders, a description of the real property, and a just and true inventory of the personal property, upon which it was levied, * * *.

"Sec. 233. * * * The service must be made by a resident or citizen of the state of New York, or a sheriff, under-sheriff, deputy sheriff, constable, bailiff or other officer having like powers, and duties of the county or other political subdivision in which the service is made. * * *

"* * * Service without the state must be made and proof thereof must be filed within sixty days after the order is granted; otherwise the order becomes inoperative. Service without the state in lieu of publication is complete ten days after proof thereof is filed.

"Sec. 235. * * * Where it appears by affidavit filed in the action or as part of the judgment roll in such action that a warrant of attachment, granted in the action, has been levied upon property of the defendant within the state, the summons may be served without an order, upon a defendant without the state in the same manner as if such service were made within the state, except that a copy of the complaint must be annexed to and served with the summons, and that such service must be made by a person or officer authorized under section two hundred and thirty-three of this act to make service without the state in lieu of publication. Proof of service without the state without an order shall be filed within

thirty days after such service. Service without the state without an order is complete ten days after proof thereof is filed.

"Sec. 969. Satisfaction of judgment from attached property. Where an execution against property is issued upon a judgment for the plaintiff in an action in which a warrant of attachment has been levied, the sheriff must satisfy it as follows:

"1. He must pay over to the plaintiff all money attached by him, and the proceeds of all sales of perishable property, or of any vessel or share or interest therein, or animals, sold by him, or of any debts, or other things in action collected or sold by him; or so much thereof as is necessary to satisfy the judgment.

"2. If any balance remains due, he must sell under the execution the other personal property attached, or so much thereof as is necessary, * * *. If the proceeds of that property are insufficient to satisfy the judgment and the execution requires him to satisfy it out of any other personal property of the defendant, he must sell the personal property upon which he has levied by virtue of the execution. * * *

"4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment."

The Decision in Shipman Coal Co. v. Delaware & Hudson Co., et al., 219 App. Div. 312, 219 N. Y. S. 628 (1st Dept. 1927), (affirmed without opinion by the New York Court of Appeals, 245 N. Y. 567).

This decision, together with the provisions of the New York Civil Practice Act covering attachments, recognized and given effect by the District Court in the light of the decision of this Court in *Erie Railway Co. v. Tompkins*, 304 U. S. 64, was the basis upon which the District Court entered its judgments in favor of the petitioners herein (27 Fed. Supp. 720), and with all of which the Circuit Court disagreed in its opinion accompanying its reversal (Tr. 74-78). There an action was commenced in the New York Supreme Court against Delaware & Hudson Company, a New York resident, and one Nahas, a resident of Pennsylvania, by means of a levy of a warrant of attachment on a certain indebtedness owed by the Delaware & Hudson Company to Nahas. The attachment property was embodied in two unsatisfied judgments recovered by Nahas against the Delaware & Hudson Company in the United States District Court for the Eastern District of Pennsylvania. The New York Court upheld the attachment. Because of the importance of that decision, we quote at length from the opinion (219 N. Y. S. 628, 630):

"There seems no ruling adverse to the contention that a judgment of a court of this state is an attachable debt, and, besides, it would also seem to be attachable as a 'cause of action arising upon contract.' That an action brought on a judgment recovered in a court of another state is a cause of action upon an implied contract within the meaning of section 902 of the Civil Practice Act prescribing the classes of actions in which a warrant of attachment may issue

cannot be gainsaid; and it would seem immaterial as matter of pure reason whether the original action in which judgment was recovered was in contract or in tort, since the cause of action was merged in the judgment which becomes a contract debt. The sole question then is whether the debt has its situs or is 'found' for purposes of attachment, within this state. Since the judgment, even though recovered in another court, represents a cause of action, debt, or demand, and it is not an 'instrument for the payment of money' within section 916, Civil Practice Act, it ought to be treated in all respects like any other debt, chose in action, or intangible personal property. It would not seem to constitute an unwarranted extension of the attachment statutes or any interference with the jurisdiction of other courts, or a lack of comity toward them, or be any infringement of public law between the states, to hold that a judgment debt has no fixed situs at the locality of the court in which it was established.

"There is no analogy whatever between instruments for the payment of money or 'evidences of debt' such as stocks, bonds, and notes and a foreign or domestic judgment. Therefore the cases which discuss the situs of notes or other instruments for the payment of money are not applicable to this question, because the paper in those instances representing the debt is capable of physical possession, and its situs is usually to be found at the locality where it is possessed. A judgment debt, however, has no actual location, such as physical property or a debt represented by physical property. The situs of a judgment debt, therefore, is probably in that locality where the court which renders it is established, subject also to the control of the courts in the jurisdiction in which its 'situs'

may be held to be for purposes of garnishment or other auxiliary processes.

"Jurisdiction *in rem* is only possible where the power of the court is sufficient to control the particular *res* in question, and, in the case of debts, the power of control for the purpose of attachment is to be found at the domicile of the debtor, as in this instance, for here is where the debt can be satisfactorily enforced and reduced to possession by reason of the control of the courts over the person and property of the debtor, the New York corporation.

"There is nothing in the language of our statute which would exclude from its operation a judgment debt recovered in the court of another state any more than a judgment debt recovered in a court of this state. The only requirement in the attachment statutes as to the situs of property made subject to attachment is that it must be 'found' within the county in which the levy is made.

"This, strictly construed, would only apply to physical property, and is an inappropriate use of the word applied to debts or other intangible property rights. Although the word is used in the statute, its scope is doubtless restricted to property over which the courts may properly exercise jurisdiction *quasi in rem* within constitutional limitations. Here the levy was made in New York county on the Delaware & Hudson Company, the judgment debtor, which is domiciled and has its principal office here, and therefore the indebtedness was 'found' here, if 'found' anywhere.

* * * * *

"It is then immaterial in what physical locality a debt, or any other attachable intangible property

right or obligation which is not an 'instrument for the payment of money,' may have been created, or where it is to be performed, or where it may exist. It is immaterial, too, where the physical evidence thereof may be found. The ground of this rule is that the power of a court over those who reside within its territorial jurisdiction is superior to that of any other court, and that consequently the residence of the person owing the obligation must determine which of two courts has the superior right to divert the obligation for the benefit of defendant's creditors * * *."

It is conceded that the Trust Company in its attachment proceeding complied with the foregoing provisions of the New York Civil Practice Act, and also proceeded in all respects with the principles laid down in the foregoing *Shipman v. Delaware & Hudson* case, since at no time did the respondent raise an objection in this regard. No answer was filed by respondent to Huron's motion in the District Court asking satisfaction of the Idaho judgment. That motion, undenied and unquestioned in relation to the facts, discloses compliance with the New York statutes and decisions (Tr. 10-12). The District Court's findings are to the same effect (Tr. 46-60).

As is observed from the brief filed by the respondent in the Circuit Court, the chief and practically the sole ground upon which it appealed thereto was on the claim that the attachment was invalid because the judgment attached was at the time on appeal and, therefore, was not a final judgment, a contention which was overruled by the Circuit Court in its opinion (Tr. 77). Indeed, that brief of the respondent, at page 25, states:

"The District Court's error was in extending that

case (*Shipman v. Delaware & Hudson*), which involved a judgment finally determined, not appealed, nor stayed, and not subject to appeal, to the dissimilar condition of the judgment here involved, and in misconceiving the issue here to be *situs*, rather than, as it is, the character as attachable property, of the District Court's judgment. * * *

"But the case of *Shipman Coal Co., supra*, did conclude that a resident of New York, against whom judgments for damages for personal injuries had been recovered in a United States District Court in Pennsylvania, might be garnished in New York in an action therein against the judgment creditor. The basis of that holding shows that its scope is limited to a judgment which *at the time of seizure* was in all respects finally determined, then due and enforceable, not stayed by supersedeas, not contingent upon the result of appeal or retrial."

The grounds upon which the Circuit Court rendered its reversal were volunteered on behalf of the respondent by the Circuit Court.

Argument.

I.

The Idaho District Court properly recognized and gave effect to the attachment proceedings which concededly in all respects complied with and were fully authorized by the laws and decisions of the State of New York.

The New York Civil Practice Act, as interpreted by the Courts of that State, *Shipman v. Delaware, supra*, has provided substantive attachment rights whereby the Trust Company was permitted to commence its action in

New York against respondent, based upon levy of what these laws and decisions construed to be an asset of respondent in the State of New York, namely, respondent's judgment against Huron, a New York resident who was conducting business and had its assets solely in New York. Huron, at the time of the attachment levy, being a New York resident, was subject to its jurisdiction and to the orders of the New York State Courts, and, accordingly, recognized the levy and orders of the State Court which Huron determined was in full accordance with the laws and decisions of New York. The unfortunate effect of the Circuit Court decision is to require Huron, and anyone else similarly situated, to act at their peril, and has the insidious effect of compelling New York residents to ignore and violate the statutes and court orders of that State.

Petitioners contend that this is the very result which this Court attempted to prevent by its decision in *Eric Railway Co. v. Tompkins, supra*, and which decision the Circuit Court held has no application to the case at bar (Tr. 78).

In *Freeman v. Alderson*, 119 U. S. 185, this Court said:

"The State has jurisdiction over property within its limits owned by non-residents and may therefore subject it to the payment of demands against them of its own citizens."

This principle is also set forth in 14 American Jurisprudence, 383, Par. 189, in these words:

"A state has uncontrolled jurisdiction over all property, real or personal, within its borders."

Certainly, it must be obvious that since the attached judgment was rendered in Idaho against Huron, a resi-

- deht of and having its sole assets only in the State of New York, the judgment for all practical purposes was merely a court record in Idaho, and its actual situs as an effective right was in New York, in which state alone would the respondent have been able to forcibly collect the judgment. This compelling reasoning was adopted by the New York Court in *Shipman v. Delaware*, *supra*, and by the District Court in its decision, 27 Fed. Supp. 720.

This principle was also discussed at length in *Chicago, Rock Island & Pacific R. Co. v. Strum*, 174 U. S. 710, 43 L. ed. 1144, where this Court said:

"The idea of locality of things which may be said to be intangible is somewhat confusing. but, if it be kept up, the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all, or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it, you must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He, and he only, has something in his hands. That something is the *res*, and gives character to the action, as one in the nature of a proceeding *in rem*."

II.

***Erie Railway Co. v. Tompkins*, 304 U. S. 64, changed the one time majority rule that a Federal judgment may not be attached in a foreign jurisdiction.**

The District Court, in applying the principle laid down in the *Erie-Tompkins* case, stated, 27 Fed. Supp. 720, at page 722: :

"Then the inquiry arises, does the principle laid down by the Supreme Court of New York when interpreting their state statute apply and come under the recent rule recognized by the Supreme Court of the United States in the case of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 822, 82 L. Ed. 1188, 114 A. L. R. 1487, where it is said:

"'Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature of "general", be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.'

"It seems clear that the decision of the *Erie Railroad* case holds that 'the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by

its highest court in a decision is not a matter of federal concern'.

"And therefore the Supreme Court of the State of New York having held that the Courts of New York can acquire jurisdiction by the issuance of an attachment out of its courts and levy upon a judgment debt recovered in a Court of another State, it would seem that the New York Court had jurisdiction at the time of the entry of judgment in the case of *The Manufacturers Trust Company v. Huron Holding Corporation*."

The Circuit Court, in its opinion (Tr. 78), held that the District Court had erred in its conclusion and said:

"The district court below holds these decisions not applicable because of *Erie Railway Company v. Tompkins*, 304 U. S. 64. That decision it contends makes the validity of the attachment of the Idaho federal judgment determinable by the law of New York, which is claimed to be that the attachment is valid. That is to say, it resolves the conflict of laws controlling the two courts in favor of that of the attaching court. The Supreme Court holds the contrary."

"Furthermore, *Erie Railway Company v. Tompkins*, *supra*, 78, plainly states that 'Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.' Obviously, the specific question here is not one of a mere local-state law but of the power of the United States district court, created and governed by acts of Congress, to issue execution to enforce its judgment or to render judgment on the supersedeas undertaking."

The Circuit Court's decision, in effect, refuses to follow the attachment statutes of the State of New York and the *Shipman v. Delaware* decision passed upon and affirmed by New York's highest Court. This, petitioners respectfully contend, is in complete violation of the principles laid down by this Court in *Erie v. Tompkins*, and should be reviewed and corrected by this Court.

Respectfully submitted,

DANIEL GORDON JUDGE,
Counsel for Petitioners.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1940.
No. 212.

HURON HOLDING CORPORATION, a corporation, and NATIONAL
SURETY CORPORATION, a corporation,
Petitioners,

vs.

LINCOLN MINE OPERATING COMPANY, a corporation,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

DANIEL GORDON JUDGE,
Counsel for Petitioners,
29 Broadway,
New York, N. Y.

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**REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT.**

The respondent's brief appears to be based upon the theory that the attached judgment was not a final one because it was in the process of appeal and therefore, was not attachable. This contention was argued by the respondent in the Circuit Court and overruled in the following portion of that Court's opinion (Tr., p. 77):

"So far as Lincoln's claim of the invalidity of the New York attachment of a federal or any other foreign judgment is based on the contention that a judgment of a trial court ceases to be final when on appeal, it can not be sustained. *Deposit Bank v. Frankfort*, 191 U. S. 499, 511. Supersedeas simply stays execution of the judgment but does not change its final quality."

Notwithstanding this, each of the four points raised in the argument of respondent's brief is predicated upon

the foregoing contention which has already been decided by the Circuit Court in favor of the petitioners.

The inventory of the New York attachment (Tr., pp. 26-27) clearly showed that the District Court judgment was so attached "*subject to the rights of said Huron Holding Corporation on the appeal taken by it from said judgment and now pending in said court.*" Indeed, no attempt was made by Huron to seek a satisfaction of the District Court judgment until *after* the mandate of affirmance from the Circuit Court had been filed on March 13, 1939 (Tr., pp. 6-8). As a matter of fact, Huron's motion for satisfaction of the judgment specifically set forth and referred to the mandate of affirmance of the Circuit Court (Tr., pp. 10 and 16). Actually, the Circuit Court's affirmance was on February 7th, 1939, although not filed until March 13, 1939 (Tr., pp. 6-8). The trust company did not even attempt to obtain a judgment on its attachment against the respondent until February 25th, 1939 (Tr., pp. 21-23) and the voluntary payments by Huron on said judgment were, therefore, made after the actual Circuit Court affirmance on February 7th, 1939.

It is obvious that, for all practical purposes, all parties concerned acted on the basis of the Circuit Court's affirmance on February 7th, 1939, even though the formal mandate was not filed until March 13, 1939. This is further shown by the fact that the attorneys for the respondent collected the sum of \$2,747.27 from Huron on their attorneys' lien in partial satisfaction of the judgment, and that said attorneys gave a partial satisfaction under date of March 8th, 1939 (Tr., pp. 32-33).

The Record in this cause, therefore, clearly shows that both the trust company and Huron, instead of acting to interfere with the jurisdiction of the Idaho District and Circuit Courts as is contended by the respondent, and as was held by the Circuit Court, actually were

cognizant of and respected fully the then pending appeal. Huron waited until the Circuit Court had fully exercised its appellate jurisdiction, by filing its mandate of affirmance on March 13, 1940, before it sought the relief of a satisfaction of its judgment which was granted by the District Court and reversed by the Circuit Court.

If, for example, the District Court had granted Huron's motion for satisfaction of the judgment *before* the Circuit Court's affirmance had been made or filed, then and only then would the respondent's arguments be pertinent and applicable. But such is not the case in this cause, and the Record, instead, clearly shows that both the trust company and Huron did nothing that can be construed as an interference with the Idaho District and Circuit Courts.

It, therefore, follows that at the time Huron's motion for satisfaction of the judgment was before the District Court, the judgment had been already fully determined by the Circuit Court, its mandate of affirmance filed, and therefore, the District Court had a right to proceed accordingly. Thus, the District Court properly assumed that the attached judgment was not in any respect contingent and correctly applied the principles involved in the cases of *Erie Railroad Company v. Tompkins*, 304 U. S. 64, and *Shipment Coal Co. v. Delaware & Hudson Co.*, 245 N. Y. 567, set forth in petitioner's brief, in granting Huron's motion.

CONCLUSION.

The petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

DANIEL GORDON JUDGE,
Counsel for Petitioners.

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CORPORATION,**

Petitioners,

—against—

LINCOLN MINE OPERATING COMPANY,

Respondent.

BRIEF FOR PETITIONERS.

✓ LEONARD G. BISCO,
✓ DANIEL GORDON JUDGE,
Counsel for Petitioners.

ALONZO L. TYLER,
Of Counsel.

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IN THE
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No. 212.

HURON HOLDING CORPORATION and NATIONAL SURETY
CORPORATION,
Petitioners,
—against—

LINCOLN MINE OPERATING COMPANY,
Respondent.

BRIEF FOR PETITIONERS.

Opinions of the Courts Below.

In an action by Lincoln Mine Operating Company against Huron Holding Corporation, the plaintiff (respondent here) obtained judgment on March 3, 1938 in the District Court for the District of Idaho, Southern Division, which was affirmed by the Circuit Court of Appeals on February 7, 1939, in an opinion reported in 101 Fed. (2d) at page 458.

Thereafter, on defendant's motion to satisfy said judgment, and on plaintiff's motion for judgment against the surety on appeal bond after remand, the District Court rendered an opinion in favor of the defendant and the surety (petitioners here), which is reported in 27 Fed. Supp. at page 720.

The opinion of the Circuit Court of Appeals for the Ninth Circuit here under review, reversed the

District Court, and is reported in 111 Fed. (2d) at page 438. It is also found at pages 74 to 78 of the present Record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [43 Stat. 938; 28 U. S. C. A., Sec. 347(a)].

Judgment of the Circuit Court of Appeals, reversing the judgments of the District Court, was entered April 30, 1940 (R. 79). An order staying the issuance of mandate until July 6th, 1940, was filed in the Circuit Court of Appeals on June 4, 1940 (R. 80). Petition for certiorari was filed in this Court on July 5th, 1940, and certiorari granted on October 14, 1940.

Nature of the Case.

This case involves the right of a State, pursuant to its own laws and rules of decision, to attach a debt, owed by one of its citizens to a nonresident, and evidenced by a judgment theretofore obtained by the nonresident against the citizen in a Federal Court sitting in another State. It also involves the right of the State Court to enforce payment of the debt so attached, by process against the citizen, for the benefit of the domestic creditors of the nonresident; and the right of the citizen, after having made such payment pursuant to valid process in the State Court, to claim and obtain satisfaction of said judgment in the Federal Court where rendered.

Parties.

The parties to the proceedings out of which this case arose are:

HURON HOLDING CORPORATION (hereinafter called "Huron"), a New York corporation (R. 48), one of the petitioners;

NATIONAL SURETY CORPORATION (hereinafter called "Surety Company"), a New York corporation (R. 4), the other petitioner;

LINCOLN MINE OPERATING COMPANY (hereinafter called "Lincoln"), an Idaho corporation, not doing business in the State of New York (R. 20), the respondent;

MANUFACTURERS TRUST COMPANY (hereinafter called the "Trust Company"), a New York corporation (R. 17-18), plaintiff in the New York action, but not a party to this review.

Facts.

On March 3, 1938, the respondent Lincoln obtained a judgment against Huron in the District Court of the United States for the District of Idaho (hereinafter called the "District Court"), in a statutory action for detention of personal property in the amount of \$6,730.70, and \$79.42 costs (R. 1-2). Huron appealed on May 31st, 1938 (R. 3-4), to the United States Circuit Court of Appeals for the Ninth Circuit (hereinafter called the "Circuit Court"). Pursuant to the terms of the order allowing the appeal (R. 3-4), a supersedeas appeal bond executed by the petitioner Surety Company, was approved and filed on May 31st, 1938 (R. 4-6).

Thereafter, on June 28, 1938, during the pendency of said appeal, the Trust Company began an action in the Supreme Court of the State of New York, County of New York (hereinafter called the "State Court"), against Lincoln on an unpaid promissory note for the sum of \$10,000 and interest (R. 17 *et seq.*). A warrant of attachment was duly issued out of the State Court on July 12th, 1938 (R. 24-25, 19), pursuant to the provisions of Sections 902, *et seq.* (and other applicable provisions), of the New York Civil Practice Act, set forth in an Appendix, annexed to this brief, at pages 49 *et seq.*

On July 12th, 1938, the Sheriff made a levy (R. 29-30) under said warrant of attachment upon Lincoln's judgment against Huron (Civil Practice Act, §917, par. 3; Appendix, p. 54). In answer to said levy, Huron filed its certificate dated July 15, 1938 (R. 30-31), as it was required to do (Civil Practice Act, §918; Appendix, p. 55), acknowledging that Lincoln had obtained said judgment of March 3, 1938, against Huron for \$6,730.70 and interest, and that said judgment was unpaid, "subject to our rights on the appeal taken by us from said judgment" (R. 30-31). An inventory of the property attached (R. 26-27) was made on July 22, 1938, as the statute provided (Civil Practice Act, §921; Appendix, p. 55).

On July 23, 1938, the summons and complaint in the State Court action were personally served upon Lincoln in Boise, by the Idaho Sheriff (R. 20-21), in accordance with the provisions of the New York statute (Civil Practice Act, §§233 and 235; Appendix, p. 49).

Lincoln did not appear either generally or specially, or move or make answer to the complaint in the State Court.

On January 27th, 1939, the attorneys for Lincoln

served and filed in the District Court a notice of their lien in the agreed sum of $33\frac{1}{3}\%$ of the recovery against Huron and costs (R. 8-9), pursuant to Idaho Law (R. bottom p. 75).

Huron's appeal from the District Court judgment of March 3, 1938 (R. 1-2), was heard by the Circuit Court on February 3, 1939 (R. 7) and judgment was affirmed on February 7, 1939 (R. 8).

The Trust Company moved for judgment in the State Court action on February 25, 1939 (R. 21-23). Judgment was entered against Lincoln on February 27th, 1939, for \$15,842.02 (R. 23). Execution was then issued to the New York County Sheriff on February 28, 1939 (R. 27-28), directed against the property theretofore attached, *i. e.*, Huron's judgment debt to Lincoln (R. 28).

Under the State Court warrant of attachment, judgment and execution, the Sheriff thus collected from Huron on March 1, 1939, the sum of \$4,805.55 or two-thirds of the amount due on the District Court judgment (R. 31, 29 and 57). On March 8, 1939, Huron paid Lincoln's attorneys the sum of \$2,747.27, in full satisfaction of their lien (R. 32-33). Receipt of this payment, and *pro tanto* satisfaction of the judgment of March 3, 1938, was acknowledged in writing by Lincoln's attorneys (R. 32-33). Huron's right to prove that the remainder of said judgment had been otherwise paid, was reserved in said receipt (R. 33).

The sum of these two payments by Huron (\$4,805.55 to the Sheriff in New York, and \$2,747.27 to Lincoln's attorneys in Idaho) was in excess of the District Court judgment of March 3, 1938.

The mandate of the Circuit Court upon its affirmance of the judgment of March 3, 1938, was filed in

the District Court on March 13, 1939 (R. 6-8). Huron then moved in the District Court for satisfaction of the judgment (R. 9-33), alleging its payments of the lien and of the attachment, above described. This motion was amended by Huron on March 29, 1939 (R. 42-44). Lincoln filed no answer to this motion.

On March 14, 1939, Lincoln made a counter-motion, for judgment against the Surety Company on its appeal bond (R. 33-35). To this motion, the Surety Company filed its answer on March 22, 1939 (R. 35-42), and thereafter an amended answer (R. 44-45), alleging substantially the same facts as Huron.

These two motions were heard together by the District Court and decided on May 4th, 1939, in favor of petitioners. The District Court decided that the judgment of March 3, 1938, was satisfied by virtue of the payments made by Huron in the New York attachment proceedings, and in Idaho to Lincoln's attorneys. The District Court likewise said in its opinion (27 Fed. Supp. 720), that the judgment having been paid, there was no independent liability on the Surety Company. Formal findings of fact and conclusions of law were prepared and filed in each motion (R. 46-60). Separate judgments were entered (R. 61-62).

From these judgments, one satisfying the District Court judgment of record, and the other denying judgment against the Surety Company, Lincoln appealed to the Circuit Court on August 3, 1939 (R. 62-63).

The Circuit Court reversed the two District Court judgments on April 30, 1940 (R. 73-79), with an opinion (R. 74-78; also 111 Fed. (2d) 438), deciding in effect that Huron's payment pursuant to the State Court attachment, was not entitled to be regarded (in the federal court) as in satisfaction of the judgment attached (R. 78).

Questions Involved.

The questions presented in this case are:

I. Was the Idaho District Court required to recognize and give effect to the attachment proceedings which in all respects complied with and were fully authorized by the laws and decisions of the State of New York?

II. Has *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, changed the rule that a federal judgment may not be attached in a foreign jurisdiction?

Specification of Errors to Be Urged.

Petitioners assign as error:

1. The refusal of the Circuit Court to recognize and give effect to the attachment proceedings which complied with and were fully authorized by the laws and decisions of the State of New York, thus subjecting Huron to liability for double payment of the same debt.

2. The determination by the Circuit Court that the attachment proceedings did not give jurisdiction to the Supreme Court of the State of New York, in the action brought against Lincoln by the Trust Company in New York.

3. The determination by the Circuit Court that the decision of this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, is not applicable to the case at bar, and did not require that the validity of the State Court attachment be adjudged in accordance with the state law.

Summary of Argument.

Point I—The New York Court had power to enforce its attachment proceedings against Huron, a New York corporation, and on that power was based its jurisdiction to bind the non-resident judgment creditor, Lincoln, to the extent of Lincoln's interest in the judgment debt attached.....	9
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Conclusion	48

POINT I.

The New York Court had power to enforce its attachment proceedings against Huron, a New York corporation, and on that power was based its jurisdiction to bind the non-resident judgment creditor, Lincoln, to the extent of Lincoln's interest in the judgment debt attached.

Huron is a New York corporation, and at all times subject to the laws and judicial processes of that State.

As Mr. Justice Holmes said in *McDonald v. Mabee*, 243 U. S. 90, "the foundation of jurisdiction is physical power, * * * (p. 91)."

The power of a State over the property and persons within its boundaries, is the basis of the State's right to subject such property, and the obligations of such persons, to the claims of the domestic creditors of a nonresident owner or obligee. The constitutional limitations imposed upon this right are dealt with in *Pennoyer v. Neff*, 95 U. S. 714. In that case it was established that principles of due process require that the nonresident defendant be given notice of the proceedings against him. Unless the defendant be served within the jurisdiction, or voluntarily appear, the attaching court has no jurisdiction to grant a personal judgment against him, and can only dispose of the property attached.

In deciding *Pennoyer v. Neff*, this Court approved of the principle that a State could and should exercise its just powers over persons and property within its borders for the protection of its citizens and the en-

forcement of their rights against nonresidents, saying at page 723:

“But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a State affecting persons resident or property situated elsewhere, no objection can be justly taken; * * *

So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens.”

In the *Pennoyer* case, this Court was concerned with the seizure of tangible property. The principles invoked are equally applicable to the attachment of debts and causes of action. Where a debt is attached, however, the jurisdiction of the attaching Court is founded upon the State's power over “persons” rather than “property” within its territory. The attachment of a debt, therefore, is not altogether the same as the attachment of property. The procedure is similar, but there is a point beyond which the

analogy cannot be carried. The action ceases to be really *in rem*, at least so far as the garnishee is concerned. The attachment of a debt becomes in essence (if not in procedure) a personal action against the garnished debtor, who must be found in the jurisdiction, but (under the *Pennoyer* rule) with notice to the nonresident creditor or "owner" of the debt (which takes the place of a *res*), in order to give him an opportunity to protect his interest in the obligation attached. See *Harris v. Balk*, 198 U. S. 215, 222, 223.

Any misapprehension there may have been as to the nature or "situs" of a debt in an attachment proceedings, was dispelled by this Court in *Chicago, Rock Island & Pacific Railway Company v. Sturin*, 174 U. S. 710. In that case, this Court again recognized the salutary nature of attachment remedies as a necessary means of subjecting the foreign creditor's assets "to the payment of *his* creditors" (p. 716). An attached debt was involved, and it was held that the idea of situs was "somewhat artificial" in that context. Jurisdiction to attach a debt arises from the power of the court over the person of the debtor. Reasons for this broad principle were given at pages 715, 716:

"The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is

due and might be paid to a nonresident to the defeat of his creditors. To do it you must go to the domicil of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. *Mooney v. Buford & George Mfg. Co.* [34 U. S. App. 581] 72 Fed. Rep. 32; Conflict of Laws, sec. 549, and notes.

“To ignore this is to give immunity to debts owed to nonresident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistence upon fictions or refinements about situs or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of *his* creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us.”

The facts here fully satisfy the requirements of the *Pennoyer* case as to due process. The jurisdiction

and power of the New York Court to enforce its process against Huron the judgment debtor, seem to be unquestionable, within the rule and authority of the *Sturm* case.

The next question is whether the attachment proceedings were authorized by the law of New York.

POINT II.

The State Court proceedings were regular in form, and fully authorized by the statutes and decided law of the State of New York.

- (a) **The procedural regularity of the State Court attachment, judgment and execution, was found below as a fact, and is admitted by respondent.**

The pertinent Statutes are annexed to this brief in an Appendix, at pages 49 *et seq.*

When Huron moved in the District Court for an order adjudging the judgment satisfied, it fully recited the various steps taken in the State Court attachment proceedings (R. 9-16), and annexed to its motion papers a full set of the papers used in those proceedings (R. 17-33). No answer to the motion was filed by Lincoln.

The District Court specifically found that the documents submitted were "duly certified" (R. 59). It also found as a fact that the—

"proceedings [in the State Court], as heretofore set forth, were within its jurisdiction, and valid and * * * that the matters of fact set forth in the exhibits and affidavits of the defendant [Huron] are true" (R. 59).

This finding was not disturbed by the Circuit Court.

Furthermore, respondent concedes procedural regularity (Brief in opposition to Petition, middle p. 4), and the subject is thus withdrawn from review here.

- (b) **The law of New York authorized the attachment of a debt evidenced by a judgment obtained in a federal court in another state.**

The New York courts construe the New York attachment statutes to mean that debts evidenced by judgments, whether local or foreign, may be attached by levy upon the debtor, in the same way as any other debt. This was decided in—

Shipman Coal Company v. Delaware & Hudson Company and Nahas (1st Dept. 1927), 219 App. Div. 312; aff'd without opinion, 245 N. Y. 567.

In that case, the Shipman Coal Company filed an action in the New York Supreme Court against the Delaware & Hudson Company, a New York corporation, and also against two brothers named Nahas who were residents of Pennsylvania. Jurisdiction was obtained over the Nahas defendants by serving Delaware & Hudson with notice of attachment, levying upon two unsatisfied judgments theretofore recovered by the nonresidents Nahas in two tort actions by them against the Delaware & Hudson Company, in the United States District Court for the Eastern District of Pennsylvania. The nonresidents Nahas, *appearing specially*, moved to vacate the levies on the ground:

“* * * that, as the situs of the debts, to wit, the judgments levied upon, was not within the State, such judgments were not property here, effective

to confer jurisdiction upon the court in this State" (219 App. Div. at p. 314).

The lower court vacated the levies of attachment. But, on appeal to the Appellate Division, the vacating orders were reversed. This reversal was sustained, without opinion, by a unanimous Court of Appeals of which Mr. Justice Cardozo was Chief Judge (245 N. Y. 567). In the opinion of the Appellate Division, per McAvoy, *J.*, it is said (219 App. Div., pp. 314-315):

"* * * In this state a judgment debt is property subject to attachment within the meaning of the attachment statute. This is precisely held in 84 N. Y. 1, *Matter of Flandrow*, where it was written:

"It * * * cannot be doubted that a judgment is, within the meaning of the Code, property subject to attachment, and of the kind incapable of manual delivery. It is an award of the court that the plaintiff recover a sum of money; and thereby a legal obligation arises on the part of the defendant to pay it. But although it is said to be a contract or debt, or obligation of record, it cannot be said to be held or to be in the possession of anyone. The clerk, as an officer of the court, keeps the record, but does not "hold" the judgment.
* * * From the very nature of the obligation it follows, that the only way to subject a judgment to attachment for the payment of a debt of the plaintiff therein is to serve the warrant upon the debtor, the person against whom the judgment was recovered."

“* * * The sole question then is whether the debt has its situs or is ‘found’, for purposes of attachment, within this state. Since the judgment, even though recovered in another court, represents a cause of action, debt, or demand, and it is not an ‘instrument for the payment of money’ within Section 916, Civil Practice Act, it ought to be treated in all respects like any other debt, chose in action, or intangible personal property.”

The court expressly repudiated any power or intent to extend its control beyond its jurisdictional boundaries, saying at page 315:

“It would not seem to constitute an unwarranted extension of the attachment statutes or any interference with the jurisdiction of other courts, or lack of comity toward them, or be any infringement of public law between the states, to hold that a judgment debt has no fixed situs at the locality of the court in which it was established.”

In this position the State Court is fully upheld by this Court’s opinion in *Harris v. Balk, supra*, pages 222, 223:

“We do not see the materiality of the expression ‘situs of the debt’, when used in connection with attachment proceedings. If by situs is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the situs thus fixed, we think it plainly untrue. * * * It is nothing but the obligation to pay which is garnished or attached. This obligation can be en-

forced by the courts of the foreign state after personal service of process therein, just as well as by the courts of the domicile of the debtor. If the debtor leave the foreign state without appearing, a judgment by default may be entered, upon which execution may issue, or the judgment may be sued upon in any other state where the debtor might be found. In such case the situs is unimportant. It is not a question of possession in the foreign state, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of."

To the same effect, see:

Chicago, etc. v. Sturm, supra.

The *Shipman* opinion makes it clear that the thing attached is the debt or cause of action evidenced by the judgment of the foreign court. The foreign judgment is given effect as proof of the debt. Unless this is kept in mind, it is possible to fall into some confusion as to the nature of the New York attachment. It is sometimes referred to as an "attachment of a foreign judgment". This is a convenient but elliptical phrase, and is not to be understood as implying that the attachment process impounds the foreign decree itself, regarded as a *thing*, or attempts to interfere with it or give it extra-territorial effect.

Attachment proceedings in New York, as elsewhere, are commonly regarded as proceedings *in rem*. Where tangible property is attached, the proceeding is literally *in rem*. But where a debt is attached, characterization of the action as *in rem* is at most an apt figure of speech, so far as the garnishee is concerned. (See

Harris v. Balk, quoted *supra*.) The phrase *in rem* is then chiefly useful as a category to define the limited effect to be given to the judgment, if the nonresident defendant does not appear in the action. The *res* is the personal obligation of the debtor-garnishee, or, phrased more exactly, the right of the nonresident creditor to enforce payment of that obligation in the State where the attachment takes place (the domicile of the debtor; see *Williams v. Ingersoll*, 89 N. Y. 508, 524). As to that, the nonresident creditor is bound by the attachment, after being given due notice, but the jurisdiction of the attaching court can extend no further, and the New York courts in the *Shipman* case emphasize the fact that they claim no further power.

The opinion of the Appellate Division is firmly based upon principles of New York law expounded in numerous leading cases:

Matter of Flandrow, 84 N. Y. 1, as quoted in the *Shipman* opinion, *supra*;

Wehle v. Conner, 83 N. Y. 231, holding that an attachment of a judgment did not interfere with the valid processes of the court granting the judgment (at p. 238), and that since such an attachment fell within the terms of the attachment statutes, it was not within the province of the courts to nullify the legislative policy therein expressed (at p. 237); see also prior decisions in the same litigation, reported at 69 N. Y. 546, and 75 N. Y. 585;

Gutta Percha Mfg. Co. v. The Mayor, 108 N. Y. 276, in which it was held, following

the *Nazro* case, *infra*, that a judgment, either foreign or domestic, was to be treated as a contract within the meaning of the attachment statutes, and created a debtor and creditor relationship, whether the original liability, on which the judgment was obtained, lay in contract or in tort;

Dunlop v. Patterson Fire Ins. Co., 74 N. Y. 145, cited in the *Wehle* case, *supra*, holding that money in hands of an officer of the court may be attached; that the attachment effects a transfer of interest by operation of law and does not constitute an interference with the court;

National Broadway Bank v. Sampson, 179 N. Y. 213, quoted and followed in the *Shipman* opinion, which held that the jurisdiction of the court to attach a debt rests solely upon the power to reach the debtor and subject him to the mandate of the court. The *Flandrow* case, *supra*, applied the same rule to judgment debts;

Nazro v. McCalmont Oil Co., 36 Hun 296, ruling that a judgment is a contract, express or implied, within the meaning of the attachment statutes; followed in *Gutta Percha Mfg. Co. v. The Mayor, etc.*, *supra*.

It will be noted that the *Shipman* decision is precisely within the policy and "necessity" of the rule laid down by this Court in *Chicago etc. v. Sturm*, *supra*, in which the jurisdiction of the state courts to attach debts at the domicile of the debtor was confirmed. Compare *Harris v. Balk*, *supra*, and see

40 Harv. Law Rev. 1153 (1927), where the *Shipman* decision is described as "a logical extension" of the rules stated by this Court in *Harris v. Balk*. See also comment on the *Shipman* case in 11 Minn. L. Rev. 654-5 (1927).

Respondent has sought to distinguish the instant attachment from that approved by the New York Court of Appeals in *Shipman v. Delaware & Hudson*, by pointing out that Huron paid the judgment of March 3, 1938, before the mandate of the Circuit Court had been filed in the District Court. But the same situation existed in the *Shipman* case, and was urged by defendants-appellant in their brief to the Court of Appeals (pp. 10-12). The following appeared at page 10 of the *Nahas* brief:

"The judgments did not become final until August 30th, 1926, when the mandate of affirmance was issued. Certainly no cause of action could possibly vest in any one prior to that date. The judgments were unenforceable prior to August 30th, 1926, hence, no cause of action can exist upon an unenforceable judgment. On August 13th, 1926, the levy was made (fol's. 204, 205, 208, 212). At the time of the levy no attachable cause of action was in existence, therefore the sheriff did not 'find' a cause of action 'within the County of New York' when he levied." (Italics in original.)

Their brief (p. 10) also pointed out (with references to the record) that a motion for reargument of the appeal was pending undetermined in the Circuit Court of Appeals for the Third Circuit when the New York levy was made. But the Court of Appeals affirmed the Appellate Division and sustained the

validity of the attachment, thus overruling the objections of the defendants (appearing specially) based upon the pendency of appeal and lack of mandate at the time of the attachment.

Thus the *Shipman* case is an exact precedent supporting the validity of the State Court proceedings in the present case. The District Court so found and in this was supported by the Circuit Court.

- (c) The money judgment in the District Court was an adjudication of Huron's debt to Lincoln and remained binding upon both parties during appeal; although execution was stayed in the District Court, the judgment was not vacated, and could be sued upon in a foreign court.

Both the District Court and the Circuit Court have concurred in this view. The District Court said, 27 Fed. Supp. 720 (at pp. 723-4):

"As to the further contention of the Lincoln Mines Operating Company that there was not a good attachment in New York, upon which jurisdiction must depend, for the reason that the debt attached was not then owing and that there was no certainty at the time of the attachment that any debt would ever be owing, as the case in which the Idaho judgment was entered was on appeal to the Circuit Court of Appeals and that any attempt to attach the Idaho judgment under such circumstances became a nullity, brings us to the question as to whether a judgment stands binding upon the parties until reversed, while an appeal from it is pending. The giving of a supersedeas bond only stayed enforcement of the judgment while the appeal was pending and

did not change the judgment nor change the debt evidenced by it, or vacate it. (Citations.)

The fact that an appeal was taken and the Idaho judgment was affirmed did not, during the pendency of the appeal, change the nature of the debt evidenced by the judgment. *Titus v. Wallick*, 59 S. Ct. 557, 83 L. Ed. * * *, decided February 27, 1939 (not yet reported in U. S. reports). And such judgment was subject to attachment." (Note: *Titus v. Wallick* is now reported at 306 U. S. 282.)

The Circuit Court of Appeals below dealt with the same point in a short paragraph (111 Fed. (2d) 438, at pp. 439-440; R. 77);

"So far as Lincoln's claim of the invalidity of the New York attachment of a federal or any other foreign judgment is based on the contention that a judgment of a trial court ceases to be final when on appeal, it cannot be sustained. *Deposit Bank v. Frankfort*, 191 U. S. 499, 511. Supersedeas simply stays execution of the judgment but does not change its final quality."

Since the District Court and the Circuit Court below were dealing with the legal effect of their own judgment, their concurrent views on the subject must necessarily be given considerable weight. They undoubtedly gave effect to the rule established in the federal courts, as shown by the following decisions:

Roberts v. Anderson (C. C. A. 10th), 66 Fed. (2d) 874, at p. 875;

Cohen v. Superior Oil Co., 16 Fed. Supp. 221, aff'd (C. C. A. 3rd) 90 Fed. (2d) 810;

Emery v. United States (D. C. W. Penn.),
 27 Fed. (2d) 992;
DuPont etc. v. Richmond Guano Co. (C. C.
 A. 4th), 297 Fed. 580;
Deposit Bank v. Board of Councilmen of
Frankfort, 191 U. S. 499;
Ransom v. City of Pierre (C. C. A. 8th), 101
 Fed. 665;
K. P. Railway Co. v. Twombly, 100 U. S. 78;
Read v. Allen, 286 U. S. 191;
Walz v. Agricultural Ins. Co. (E. D. Mich.),
 282 Fed. 646, 649;
Straus v. American Publishers Association
 (C. C. A. 2d), 201 Fed. 306, 310;
United States ex rel. Coffman v. Norfolk &
Western Railway (S. D. W. Va.), 114 Fed.
 682, 685.

The above decisions; while not exhaustive, are a fair indication of the uniformity with which the United States courts have said that neither appeal nor stay of execution have the effect of vacating a judgment or suspending its operation as an adjudication between the parties which may be pleaded in another court.

Two states, California and Oklahoma, have adopted a different rule, apparently as a matter of statutory interpretation. The Supreme Court of California, interpreting a specific state statute, decided in *Jennings v. Ward* (1931), 114 Cal. A. 536, 537:

“It is the settled rule in California, though the weight of authority in other jurisdictions is to the contrary, that judgment is not final so long as an appeal is pending therefrom, even though a *supersedeas* bond has not been furnished.”

The California Statute which was interpreted by the California court to compel the above result, is found in Section 1049 of the California Code of Civil Procedure which reads in part as follows:

“Sec. 1049. An action is deemed to be pending from the time of its commencement until its final determination upon appeal, * * *.”

The Oklahoma courts follow the California rule:

Tulsa v. Wells, 79 Okla. 39, 191 P. 186; and see

Coppedge v. Clinton, 72 Fed. (2d) 531, applying the Oklahoma rule when a judgment of that state was offered in a federal court.

But Compare:

Cohen v. Superior Oil Co., *supra*, where the *Coppedge* decision was criticized (at p. 226).

The statute in Idaho (Idaho Code Ann., §12-606) is the same as the California statute above quoted. So are the statutes in Oregon and South Dakota. But the Oregon courts do not construe the statute as depriving a judgment of finality pending appeal, *Day v. Holland*, 15 Or. 464, 468, 469. Nor will such a statute be so construed in the federal courts, unless compelled by the decisions of the local courts. Thus the leading case of *Ransom v. City of Pierre* (C. C. A. 8th), 101 Fed. 665, involved a South Dakota judgment, on appeal and stayed by supersedeas bond, and the interpretation that should be given to the South Dakota statute (exactly like the California statute above quoted) in the absence of controlling state decision. The court ruled, at page 669:

“In many cases the question has been mooted

whether, when a writ of error has been sued out, or when an appeal has been taken which operates essentially as a writ of error, to review a judgment at *nisi prius*, and a supersedeas bond has been given to stay proceedings, such a judgment may be received in evidence in another suit between the same parties in support of the plea of *res adjudicata*; and, while the decisions upon this question have not been uniform, yet, in our judgment, the weight of judicial opinion, as well as sound reason, is that, when a case which is removed to an appellate court by a writ of error or an appeal is not there tried *de novo*, but the record made below is simply re-examined, and the judgment either reversed or affirmed, such an appeal or writ of error does not vacate the judgment below, or prevent it from being pleaded and given in evidence as an estoppel upon issues which were tried and determined, unless some local statute provides that it shall not be so used pending the appeal. A supersedeas bond merely operates to stay an execution or other final process on the judgment. It does not vacate the judgment, nor prevent either party thereto from invoking it as an estoppel."

The general acceptance of the principles above stated by the text book writers is also of importance. We call attention to:

3 *American Jurisprudence*, under title "Appeal & Error", Secs. 525 and 526. In the latter Section, the following statement appears:

"The rule that where an appeal or writ of error does not vacate or suspend the original judgment, an action may be maintained thereon

in the courts of another state, is uniformly recognized. And where, in the state where the judgment was rendered, a supersedeas bond given in proceedings in error serves the purpose of staying the execution of the judgment only, and is no obstacle in the way of another action on the judgment, an action is maintainable thereon in the courts of another state. * * *

3 *Moore's Federal Practice*, 3300, where it is said:

"While supersedeas stops any future executions on the specific judgment appealed from, it does not suspend the operation of the judgment as an estoppel nor does it preclude the bringing of other actions."

8 *Hughes on Federal Practice*, Secs. 5511 and 5512. In the latter Section, at page 80, it is stated that—

"* * * an appeal, where a supersedeas is obtained, does not preclude the parties from prosecuting collateral or independent proceedings,"

citing *Lee v. Jackson Light & Traction Co.* (C. C. A. 5th), 261 Fed. 721, to the effect that neither appeal nor supersedeas prevents valid garnishment proceedings under a judgment (8 *Hughes*, p. 81, n. 28).

5 *American Law Reports*, 1269, where the prevailing rule on this branch of the law is summarized as follows:

"* * * If an action may be maintained on such judgment, notwithstanding the appeal or writ of error, in the state in which it was rendered, even though the issuance of execution thereon be

stayed, it may be maintained in any other state; although if execution has been stayed in the state where the original judgment was rendered, the court in which suit is brought thereon will ordinarily also stay execution pending the determination of the appeal.

The rule that where an appeal or writ of error does not vacate or suspend the original judgment, an action may be maintained thereon in the courts of another state, is uniformly recognized."

As pointed out in Robertson & Kirkham on "*The Jurisdiction of the Supreme Court of the United States*" (1936 Ed.), at page 2, note 5:

"The Conformity Act (28 U. S. C. A. Sec. 724, R. S. Sec. 914) does not apply to appellate proceedings in the federal courts, and state forms of practice and procedure do not affect these proceedings [citations]."

A fortiori, the legal effect of appeal upon a federal judgment is a matter of distinctly federal concern, unaffected by local rule or statute.

We submit that the vitality of the rule that a federal judgment is binding until reversed, is amply illustrated by the above citations and authorities. The finality of the District Court judgment in favor of Lincoln against Huron, therefore, was not disturbed by appeal or stay of execution. That judgment remained an adjudication and estoppel between the parties until reversed, and its availability as the basis of an action, or as evidence of an attachable debt in New York, is thus fully established.

POINT III.

The Circuit Court's failure to judge the validity of the State Court attachment in accordance with the state law, and its application of a general federal rule instead, is contrary to the principles laid down by this Court in *Erie R. R. Co. v. Tompkins*, 304 U. S. 64.

The Circuit Court, after indicating in its opinion (R. 77) that there were a number of decisions in the federal courts to the effect that federal judgments were not subject to garnishment in foreign jurisdictions, said (R. 78):

"The district court below holds these decisions not applicable because of *Erie Railway Company v. Tompkins*, 304 U. S. 64. That decision it contends makes the validity of the attachment of the Idaho federal judgment determinable by the law of New York, which is claimed to be that the attachment is valid. That is to say, it resolves the conflict of laws controlling the two courts in favor of that of the attaching court. The Supreme Court holds the contrary."

In other words, the Circuit Court decided that the validity of the attachment in the State Court was to be determined by federal law and not by the law of the state where the attachment took place. The conflict between the "two courts" (state and federal) is thus, clearly, not a "conflict of laws" but a conflict of decision, which the Circuit Court held should be resolved in favor of the general federal rule.

The Circuit Court in the next paragraph of its opinion said (R. 78):

"Obviously the specific question here is not one of mere local state law * * *."

The Circuit Court thus indicated that it relied upon the distinction between "state laws strictly local" and "questions of a more general nature", announced by Mr. Justice Story in the historic case of *Swift v. Tyson*, 16 Pet. 1, 18. That distinction long dominated the course of decision in this Court and in the federal courts generally, but was finally abolished in *Erie v. Tompkins*.

It should be stated at the outset, however, that it seems doubtful whether the distinction between local and general matters was properly made in this case, even under the doctrine of *Swift v. Tyson*. We have in mind the definite statement of this Court in *Harris v. Balk, supra*, at page 222:

"Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there."

And the Court went on to say in terms that the converse is true. The New York law of attachments is found in the local statutes (Appendix), as well as in the decisions of the state courts interpreting those statutes. Although it is said that "attachment laws had their origin in the custom of London" (*Chicago etc. v. Sturm, supra*, 714-715), the New York statutes have been held to be in derogation of the common law, *Penoyar v. Kelsey*, 150 N. Y. 77. Even if they were declaratory of the common law, there would still be no room for the application of "general" common-law principles, even under *Swift v. Tyson*, because the meaning and effect of the statutes have been settled by the state courts. As this Court said in *Burns Mortgage Co. v. Fried*, 292 U. S. 487 at pages 493, 494:

"The applicable state statute furnishes the

rule of decision for a federal court sitting in the state or outside its borders. And in that court the law must be given the meaning and effect attributed to it by the highest court of the state, as if the state court's decision were literally incorporated into the enactment, whatever the federal tribunal's opinion as to the correctness of the state court's views."

It may be inevitable in our federal system, comprising many coordinate jurisdictions, that conflicts or differences of decision should arise. But such conflicts were particularly acute between the federal and the state courts so long as the decision in *Swift v. Tyson*, *supra*, remained as the authoritative construction of Section 34 of the Federal Judiciary Act of September 24, 1789 (28 U. S. C. A., Sec. 725), and thus gave sanction to the enforcement of a body of "general law" in the federal courts, often at variance with the law applied by the courts of the several states.

It was the salutary purpose and effect of the decision in *Erie v. Tompkins*, overruling *Swift v. Tyson*, to establish a general principle in our jurisprudence that would abolish such conflicts between state and federal courts. The power to formulate and enforce general rules of substantive law, contrary to the express rules of decision in the several states, if it ever existed, has been renounced by the federal courts, and it is now recognized, as stated by Mr. Justice Holmes, in *Black and White Taxicab v. Brown and Yellow Taxicab*, 276 U. S. 518 at page 535, that

"the authority and only authority is the state and if that be so, the voice adopted by the state

as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word." (Quoted in *Erie v. Tompkins*, at p. 79.)

Examining the authorities referred to in the opinion of the Circuit Court (R. 77) quoted above, we find that the early decisions in the federal courts followed the rule adopted in many (but not all) of the state courts, to the effect that judgments were not subject to attachment in a foreign jurisdiction. See *Drake on Attachments* (6th Ed. 1885) Sections 620-625. The adherence to such a rule by the federal courts was not unnatural; it was the "majority rule". It is noteworthy, however, that the federal courts were more or less *hors de combat* in this field, since they themselves, in the absence of federal statute authorizing it, did not take jurisdiction over the property of non-appearing defendants by means of attachment proceedings (*Labard v. Ubarri*, 214 U. S. 173; *Big Vein Coal Co. v. Read*, 229 U. S. 31, and many earlier cases).

Insofar as the decisions cited by the Circuit Court applied state law in accordance with the statutes and decisions of the states affected, their rulings as to the effect of attachments are not subject to criticism; for example, *Franklin v. Ward*, 9 Fed. Cases 711 (C. C. R. I. 1822), where Circuit Judge Story was called upon to interpret the Rhode Island law.

Also in *Thomas v. Wooldridge*, 23 Fed. Cases 986 (C. C. S. D. Mo. 1875), Bradley, Circuit Judge, at page 987, said:

"The question in this case is whether a judgment of this court may be attached by process

issued out of a state court against the plaintiff in the judgment. The general rule applicable to foreign judgments by the Custom of London (from which our attachment laws are derived) is, that a debt of record in a superior court and even a debt in suit, cannot be attached. Different reasons have been assigned, namely, that a record is of too high a nature to be attached; that it is against the dignity of the court to be thus interfered with; that the debt is *quasi in custodia legis*, and that the party has no opportunity to plead the attachment. [Citations.] But whatever might have been the ground of the rule, it has been adhered to in many of the states, although not in all. [Citation.] The question is made to depend somewhat on the statutes of the particular states."

It should be noted that Judge Bradley recognized that the question before him depended "somewhat on the statutes of the particular states". To this statement would now be added, since *Erie v. Tompkins*, "and upon the decisions of the particular state" and the word "somewhat" would be omitted. He was, in that case, dealing with the laws of Mississippi. Our attachment arose under the laws (and decisions) of New York, where, as shown in the *Shipman* opinion, the common-law and historic reasons given in Judge Bradley's decision, although not overlooked, have been rejected as contrary to legislative intent and realistic analysis.

By the time *Henry v. Gold Park Mining Co.*, 15 Fed. 649 (cited by the Circuit Court, R. 77), came to be decided, the federal rule regarding attachments was firmly fixed in the minds of the federal judges,

particularly in view of the decision of this Court in *Wallace v. McConnell*, 13 Pet. 136, 151 (1839), which they deemed to be controlling.

In *Wallace v. McConnell*, *supra*, the question was a limited one, namely, whether a district court having before it an action to enforce a debt, should abate the action, on the plea of defendant, because the debt in suit had been attached in a state court. The defendant had not paid the debt in the state court or anywhere else. This Court ruled that the plea of abatement was bad and that the case should proceed to judgment in the federal court. It was not there decided, however, that the proceeding in the state court could not continue in accordance with the state law or that its determination would be of no effect in the federal court if it did. That issue was not before this Court. (Cf. *Kline v. Burke Construction Co.*, 260 U. S. 226.) Nor was a valid state court attachment (and consequent payment) of a debt evidenced by a federal judgment decided to be a nullity in *Wallace v. McConnell*. The case, however, has been cited on numerous occasions for those propositions, and other extensions of its actual holding. It was so cited in every case referred to by the Circuit Court (R. 77), except *Franklin v. Ward*, which was decided before the *Wallace* case.

Insofar as *Wallace v. McConnell* is construed to support the view that no state court can validly attach a debt and proceed to judgment thereon while the debt is in litigation in a federal court, it seems to have been overruled by *Kline v. Burke Construction Co.*, *supra*. In that case this Court held that no interference or conflict of jurisdiction did or in fact could arise out of the circumstance that a federal

and a state court entertained jurisdiction of the same parties and the same cause of action at the same time. Each court is free to proceed in its own way, affected by the other court only insofar as notice of the latter's determinations is brought to it in the usual way, and then only as the facts and the rule of *res judicata* may require.

Mack v. Winslow, 59 Fed. 316 (C. C. A. 6th, 1893), was a suit of interpleader instituted by a judgment debtor (against whom judgment had been obtained in the Kentucky District Court), who had been garnished, before judgment in the District Court, in an attachment action in Ohio (against the plaintiff in the District Court). All of the parties were before the court and the plaintiff in the Ohio attachment action claimed a lien and consequent priority in the distribution of the funds in court. It does not appear that the law of Ohio was proved to recognize the validity of attachments of foreign judgments, and the Court applied its own rule, disallowing the attaching creditor's lien. The garnishee had not paid in Ohio and was not subjected to double liability. The District Court thought it unnecessary to decide whether the Ohio court had acquired jurisdiction over its non-resident defendant, but held that a debt *in suit* was not subject to attachment in a foreign court, citing *Wallace v. McConnell*, *supra*.

U. S. Shipping Board Merchant Fleet Corp. v. Hirsch Lumber Co., 35 Fed. (2d) 1010 (App. D. C. 1929), is in no sense an authority against the petitioners, since the court was there performing its unquestionable duty of construing the attachment statute of the District of Columbia, to determine

whether under that law it should attach a judgment rendered in the District Court of Florida. It is not doubted that the District of Columbia courts, as well as the courts of every jurisdiction, have the power and right to interpret their own statutes and determine whether or not, in the light of the legislative policy there expressed, they will attach foreign judgments.

In *Wabash R. R. Co. v. Tourville*, 179 U. S. 322, it was contended that an Illinois attachment, and consequent payment, of a debt in litigation (and finally reduced to judgment) in Missouri, was not given full faith and credit by the Missouri courts. This Court held that the question was not adequately presented by the record, Mr. Justice McKenna saying that (p. 327):

“* * * counsel has ably and fully discussed the law and effect of garnishment. We do not think it necessary to enter into that discussion as fully as counsel have. The judgment of the [Missouri] court of appeals was undoubtedly final. * * * The rule precludes in that state the adjudication of rights occurring subsequently to the rendition of the original judgment. [Citing Missouri case.]”

A motion was also made by the defendant (the garnishee in the Illinois proceedings) to quash the Missouri execution. As to the motion, the Court said (p. 327):

“It is not clear from the opinion of the supreme court [*i. e.*; the Missouri decision from which appeal was taken] whether the lower court under the local procedure had as little power over the execution of a judgment as it had over the

judgment entered on the mandate of the court of appeals."

The opinion ends with a dictum, on which respondent relies, that the ruling of the Missouri Supreme Court, holding that the Missouri judgment was not subject to garnishment in Illinois, was "sustained by the weight of authority."

Insofar as the *Tourville* case decided that the validity of the Illinois garnishment was to be determined by the general law, or the "weight of authority", rather than by the law of Illinois where the garnishment took place, we submit that it has now been overruled by *Erie v. Tompkins*.

In neither the *Tourville* nor the *Wallace* case did this Court decide that a judgment debtor's payment of a debt evidenced by a foreign judgment, under the compulsion of a state court attachment, valid under the laws of the state, should be regarded as a nullity upon the judgment debtor's motion to satisfy the judgment. The weight and effect to be given to such a payment in a foreign jurisdiction, necessarily depends upon the validity of the attachment proceedings which compelled the payment. Such validity, under the doctrine of *Erie v. Tompkins*, is to be found in the authority of the law of the state where the attachment took place. These principles were applied in *National Automatic Tool Co. v. Goldie*, 27 Fed. Supp. 399, 401; in *Lawley v. Whiteis*, 24 Fed. Supp. 698, 700, and in *Heydemann v. Westinghouse* (C. C. A. 2d), 80 F. (2d) 837, 840.

Nor is there any modern justification for the suggestion that the attachment interfered with the jurisdiction or prerogatives of the District Court. The

"federal rule", that would prohibit the attachment of federal judgments, is quite frankly of historical origin. (See *Thomas v. Wooldridge*, *supra*; cf. *Shinn v. Zimmerman*, 23 N. J. Law 150, 153, and *Burrell v. Letson*, 2 Speers (S. C.) 378.) "A debt recovered by judgment at Westminster cannot be attached under custom of London" (*Sir John Parrot's case*, Cro. Eliz. 63; *Kerry v. Bower*, Cro. Eliz. 186). These early opinions remind us that the jurisdictional rivalries and jealousies in the English courts of that day were far more personal and venomous than would be tolerable now. See *Drake on Attachments*, §620.

The common law rules are but roughly applicable, if at all, to the American attachment statutes (of great variety) in the several states. The courts in the majority of the states soon repudiated the English rule that their own judgments were not attachable (*Drake*, §624) and several saw no reason why the legislative policy expressed in the statutes was not broad enough to cover debts proved by foreign or federal judgments as well. (*Fithian v. New York & Erie*, 31 Pa. St. 114; *Knebelkamp v. Fogg*, 55 Ill. App. 563; *Fuller v. Foote*, 56 Conn. 341.)

Many judges have spoken very strongly on the unreality of this old contention that it was beneath the dignity of one court to give heed to the lawful process of another. The Supreme Court of Wisconsin said in *Jones v. St. Ouge*, 67 Wis. 520, at p. 524:

"The garnishee process operated upon the parties, and not upon the circuit court. The order to pay was made after rendition of such judgment, and hence in no way frustrated the jurisdiction of that court."

And in *Fithian v. N. Y. & Erie R. Co.*, *supra*, the Pennsylvania court said (p. 116):

“We see no reason why a debt established by a judgment may not be attached. If the debtor in the judgment should be compelled to pay any part of it to satisfy a creditor of the plaintiff therein, the courts of New York have ample power to see that the amount so recovered be allowed as payment of the judgment *pro tanto*. The courts of this state would certainly give full effect to such a judgment against a garnishee.”

Compare:

Luton v. Hoehn, 72 Ill. 81, 82;

Fuller v. Foote, *supra*;

Gager v. Watson, 11 Conn. 168;

Calhoun v. Whittle, 56 Ala. 138.

The more recent view is expressed in *Hardwick v. Harris*, 22 N. M. 394 (1917), in which the Supreme Court of New Mexico dealt with this question of interference in the following terms (p. 398):

“In regard to the interference with the jurisdiction of one court by another of the same state if garnishment under these circumstances is to be allowed, we can see no merit in the argument. When a court issues its execution for the collection of the money judgment it furnishes to the judgment creditor a means of enforcing this judgment. The court is not interested in the collection of the judgment, but the judgment creditor is. If he is prevented from collecting the judgment under execution by reason of garnishment process served upon his debtor in an action against him, his hand is stayed, not the hand of the court. See Rood, Garnishments, sec.

146, and the Wisconsin and Illinois cases, cited *supra*. Besides, the execution of the judgment would not be stayed by the fact of the garnishment of the judgment debtor. It could not be stayed except upon application to the court issuing the execution. If the judgment is collected under the execution, this would furnish a good defense to the judgment debtor in the garnishment proceeding and could be set up in his answer. If the execution were not to be levied until after the garnishee had answered in the garnishment proceedings, he might ask leave to file a supplemental answer. If the execution were not served until after judgment was taken against the garnishee in the garnishment proceeding, he might obtain relief from the judgment by *audita querela*, or a motion in the nature of *audita querela*. There is no conflict between the jurisdictions of the two courts, as the process of neither can be controlled by the other."

"There can be no question of judicial supremacy or of superiority of individual right," said this Court (*Kline v. Burke, supra*), discountenancing an asserted rivalry between federal and state courts. The modern treatment of such relations has uniformly been in terms of comity, recognition and cooperation (*National Automatic Tool v. Goldie, supra*; *United States v. Klein*, 303 U. S. 276, 281-2).

The State Court attachment in the instant case did not interfere with the District Court, as a matter of fact. The State Court applied its own substantive and procedural law to enforce Huron's personal liability. Such liability was evidenced by the judgment of the District Court, which was entitled to recogni-

tion in every state and could be made the basis of an action, as on a contract, in the State of New York (see Point II, p. 15, *supra*). Lincoln's right to enforce the obligation in New York was transferred (as a result of notice constituting due process) by operation of law to the plaintiff in the attachment proceedings, who was Lincoln's creditor in the State of New York. These circumstances, when duly proved as facts in the District Court, were matters that necessarily had to be dealt with by that court in determining whether its judgment was in fact satisfied and whether execution should issue. They did not deprive the federal court of power to deal with its own judgment or execution in such manner as justice required.

If Lincoln had voluntarily assigned its judgment, and such judgment had thereafter been satisfied in a foreign jurisdiction, either voluntarily or as a result of suit, that state of facts, if proved in the District Court, would have required the District Court to withhold execution and mark its judgment satisfied. But it would not be supposed that such facts, or the intervention of an assignee in any event, would constitute an unwarranted "interference" with the processes or jurisdiction of the federal court. No more should a transfer, by operation of the law of attachment in a valid state proceeding, be deemed an attempted intervention in the local affairs or administration of the court rendering judgment. It is submitted that these are not "matters governed by the Federal Constitution or by Acts of Congress" (R. 78) within any exception to the rule of *Eric v. Tompkins*.

The Circuit Court, reversing the District Court, seemed to regard the question of validity as involving a conflict, as if the New York attachment could be valid under New York law but invalid under federal

law. The conflict was then resolved in favor of the federal law, *i. e.*, by application of a general rule said to be paramount in the federal court and superior to the authority of the local law. The general federal rule is said to have the sanction of this Court (R. 78).

It is the position of the petitioners that the approval of this Court, if ever given to such a general rule, was at a time when the doctrine of *Swift v. Tyson* was followed here. That is no longer the situation. The validity of the New York attachment, as a fact to be considered in determining the motions in the District Court, was referable to the law of New York, and the decisions of the New York courts. No general rule of federal law applied to that issue. The power of the federal court to determine the motions in accordance with its own law, upon the facts before it, is not questioned. The controlling facts here were the validity of the attachment, and the compulsion of the payment thereunder. Unless those facts were correctly found by application of New York law, the motion for satisfaction of judgment could not be, and under the Circuit Court opinion was not, correctly decided.

Cf. West v. American Telephone & Telegraph Co., and

Fidelity Union Trust Co. v. Field,

both decided by this Court December 9, 1940.

POINT IV.

The District Court in deciding that its judgment was satisfied by Huron and that no judgment should issue against the Surety Company, correctly adjudged the issues before it and gave due weight under its own law to the facts proved, including the validity of the State Court proceedings and Huron's prior payment of the judgment debt pursuant thereto.

This case comes here on review of the Circuit Court's reversal of the action taken by the District Court on two motions. One was Huron's motion for satisfaction of the judgment of March 3, 1938 (R. 9 *et seq.*), and the other was Lincoln's motion for judgment against the Surety Company (R. 33 *et seq.*). These motions were duly authorized:

Federal Rules of Civil Procedure, Rule 69(a), which provides in part:

"The procedure on execution, in proceedings supplementary to and in aid of the judgment and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable."

Idaho Code Annotated, Sec. 7-1113, providing in pertinent part:

"Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment or make such endorsement, and upon motion the court may

compel it, or may order the entry of satisfaction to be made without it."

Tanner v. Wood, 13 Idaho 486.

Federal Rules of Civil Procedure, Rule 73(f), which provides:

"By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known."

Federal Rules of Civil Procedure, Rule 43(e), which provides:

"When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

In its motion for a satisfaction of judgment, Huron set up partial satisfaction by reason of payment of the attorneys' lien (which is not disputed, R. 32-33) and payment of the balance, pursuant to the New York attachment proceedings (R. 9-31). Lincoln filed no answer to Huron's motion.

Lincoln's motion for judgment against the Surety

Company claimed the full amount of the judgment as on an independent liability. The Surety Company, however, filed its answer (R. 35 *et seq.*) claiming that it was liable as surety only to the extent that the judgment was not satisfied by Huron and alleging the same facts in defense as Huron had set forth in its motion for satisfaction.

On the motion, therefore, the District Court was called upon to determine the truth or falsity of the facts alleged and then to decide, under the law of the forum, the juridical effect of the facts found to be true.

The very existence and necessity of this procedure is proof that the state attachment proceeding had not, in any jurisdictional or real sense, interfered with the "power of the United States District Court created and governed by Acts of Congress" (R. 78), over its execution or its judgments.

The validity of the State Court attachment and Huron's payment thereunder, was the principal circumstance (factual in the District Court), upon which petitioners relied. On these issues the District Court found favorably to the petitioners (R. 59). Since these were not "matters governed by the Federal Constitution or by Acts of Congress" (R. 78), the District Court applied the New York law in making these findings, following the rule of *Erie v. Tompkins*, where this Court said that "the law to be applied in any case is the law of the state."

Upon finding that the State Court proceedings were valid, the effect to be given them by the District Court was then controlled by the *Constitution* and the *Acts of Congress*:

Constitution, Article IV, Sec. 1, which provides that

“Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”

Judicial Code and Judiciary Act, 28 U. S. C. A., Sec. 687, R. S. 905, the last sentence of which is

“And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state, from which they are taken.”

Federal Judiciary Act of September 24, 1789 (28 U. S. C. A. §725) which provides:

“The Laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”

Giving the proceedings of the State Court the faith and credit to which they were thus entitled, the District Court held on the record before it, and upon the law properly administered there, that Huron was justly entitled to a satisfaction of its judgment. The controlling principle was stated by this Court in *Harris v. Balk*, *supra*, at page 226:

“It ought to be and it is the object of courts to

prevent the payment of any debt twice over. Thus, if Harris, owing a debt to Balk, paid it under a valid judgment against him, to Epstein, he certainly ought not to be compelled to pay it a second time, but should have the right to plead his payment under the Maryland judgment."

And see *Drake on Attachment* (1885), in Section 716, where he says:

"* * * as it is an invariable rule that the garnishee shall not be required to pay his debt twice, * * *."

This principle of justice is found in many places in Drake's treatise, for instance, again in Section 617:

"It is an invariable and indispensable principle that a garnishee shall not be made to pay his debt twice."

In *Embree and Collins v. Hanna*, 5 Johns. (N. Y.) 101, *supra*, cited by this Court with approval in *Wallace v. M'Connell*, 13 Pet. 136, 151, Kent, *Ch. J.*, says (p. 102):

"Nothing can be more clearly just than that a person who has been compelled by competent jurisdiction, to pay a debt once, should not be compelled to pay it over again."

And further in the opinion, in discussing the force of the rival claims of plaintiff against defendant in such situations:

"Admitting the cases to stand equally in equity (and the claim of the debtor to protection who has been obliged to pay once, must be admitted to

be at least equal in equity) the interest of the defendant ought to be preferred."

Petitioners do not contend that payment under compulsion of foreign attachment necessarily in every case compels that the court protect the garnishee. If the facts make satisfaction of the judgment unjust in any case, the judgment creditor is not without remedy on a motion for satisfaction. As this Court pointed out in *Harris v. Balk*, *supra*, at page 227: . . .

"* * * if the garnishee were guilty of negligence in the attachment proceeding, to the damage of Balk, he ought not to be permitted to set up the judgment as a defense."

In the instant case, Lincoln filed no answer to the motion for satisfaction and raised no issue of negligence or fault on the part of Huron or want of liability to the Trust Company in the New York action. Nor did Lincoln appear in the State Court action, although it could have appeared specially to contest the jurisdiction as the *Shipman* case shows (see this Brief, p. 14). Lincoln gave no instructions to Huron, made no demands to oppose the attachment. No state of facts was asserted by Lincoln before the District Court, on which any claim of equity in its favor could be based.

On the record before it, the District Court, with full power to control its process, without interference or compulsion of any kind (except the obligation to do justice between the litigants), correctly held that the judgment was satisfied by Huron and that the Surety Company was thereby released of its obligation on its bond.

Conclusion.

The Circuit Court reversed these just judgments of the District Court. The Circuit Court's opinion did not question but in effect sustained the District Court's finding that the State Court attachment proceedings were valid where rendered and binding there, to the extent of the property attached, upon both Lincoln and Huron. Nevertheless, the Circuit Court refused to give effect to the New York law, basing its reversal on a federal rule of general law, contrary to the mandate of *Erie v. Tompkins*. Such ruling, if sanctioned here, would tend to take away from one who obeys his state's lawful commands, that protection to which he is rightfully entitled in all the courts of the United States.

Respectfully submitted,

LEONARD G. BISCO,
DANIEL GORDON JUDGE,
Counsel for Petitioners.

ALONZO L. TYLER,
Of Counsel.

Appendix.

Certain Provisions of the New York Civil Practice Act
Referring to Attachment Proceedings and Pertinent
to this Case.

ARTICLE 25

SUMMONS

§233. Service without the state in lieu of publication.

In all cases when publication of the summons is ordered, service of the copy of the summons and complaint and of any accompanying notice required by rules by the delivery thereof to the defendant personally without the state is equivalent to notice by publication and deposit in the post-office. The service must be made by a resident or citizen of the state of New York, or a sheriff, under-sheriff, deputy sheriff, constable, bailiff or other officer having like powers and duties of the county or other political subdivision in which the service is made, or an officer authorized by the laws of this state to take acknowledgments of deeds to be recorded in this state, or an attorney and/or counsellor at law, solicitor, advocate or barrister duly qualified to practice in the state or country where such service is made, or by a United States marshal or a deputy United States marshal. Service without the state must be made and proof thereof must be filed within sixty days after the order is granted; otherwise the order becomes inoperative. Service without the state in lieu of publication is complete ten days after proof thereof is filed.

§235. Personal service out of the state without order.

Where the complaint demands judgment that the defend-

ant be excluded from a vested or contingent interest in or lien upon a specific real or personal property within the state or that such an interest or lien in favor of either party be enforced, regulated, defined or limited, or otherwise affecting the title to such property, or where the complaint demands judgment annulling a marriage, or for a divorce, or a separation; or where it appears by affidavit filed in the action or as part of the judgment roll in such action that a warrant of attachment, granted in the action, has been levied upon property of the defendant within the state, the summons may be served without an order, upon a defendant without the state in the same manner as if such service were made within the state, except that a copy of the complaint must be annexed to and served with the summons, and that such service must be made by a person or officer authorized under section two hundred and thirty-three of this act to make service without the state in lieu of publication. Proof of service without the state without an order shall be filed within sixty days after such service. Service without the state without an order is complete ten days after proof thereof is filed.

ARTICLE 46

ARREST, INJUNCTION AND ATTACHMENT: GENERAL PROVISIONS

§814. Order or warrant to which this article applies. An order or warrant referred to in this article means either an order for the arrest of a party, an order for a temporary injunction or a warrant of attachment against property.

§815. Application for order or warrant without notice. Except as otherwise specially prescribed by statute, an

application for such an order or warrant, either before or after the defendant's appearance in the action, may be made without notice.

§816. Proof on application or hearing. Proof of a sufficient cause of action or fact in support thereof or of any extrinsic fact, to entitle a party to such an order or warrant, or proof to support or oppose a motion to vacate the order or warrant or discharge a person from arrest, or discharge an attachment, may be made by affidavit and by such other written evidence as the rules permit.

§817. By whom order or warrant may be granted. Except as otherwise specially prescribed by statute, or rules adopted as provided in this section, any such order or warrant may be granted, in a proper case, either by the court in which the action is brought or a judge thereof or any county judge; * * *.

§818. At what time the order or warrant may be granted. The order or warrant may be granted to accompany the summons or at any time after the commencement of the action, but it may not be granted after final judgment, except as otherwise specially prescribed by statute.

§819. Security. Except where security is expressly dispensed with by statute, such an order or warrant shall not be granted unless the party applying therefor gives security for the protection of the party against whom or whose property the order or warrant, is to be directed. Except where the security is especially regulated by statute, it shall consist of an undertaking with sufficient sureties. The undertaking shall be to the effect, and in the amount if any, prescribed by statute relating to the particular remedy.

§821. Order or warrant to recite the grounds therefor. The order or warrant must briefly recite the ground or grounds on which it is granted.

§825. Jurisdiction acquired from time provisional remedy granted. From the time of the granting of a provisional remedy, the court acquires jurisdiction and has control of all the subsequent proceedings. Nevertheless, jurisdiction thus acquired is conditional, and liable to be divested in a case where the jurisdiction of the court is made dependent by a special provision of law upon some act to be done after the granting of the provisional remedy.

ARTICLE 54

ATTACHMENT: WHEN ALLOWED: OBTAINING WARRANT

§902. In what actions attachment of property may be had. A warrant of attachment against the property of one or more defendants in an action may be granted upon the application of the plaintiff, as specified in the next section, where the action is to recover a sum of money only, as a tax or as damages for one or more of the following causes:

1. Breach of contract, express or implied, other than a contract to marry.

§903. What must be shown to procure warrant of attachment. To entitle the plaintiff to such a warrant, he must show that a cause of action specified in the last section exists against the defendant, and, if the action is to recover damages for breach of contract, that the plaintiff is entitled to recover a stated sum, over and above all

counterclaims known to him. He must also show that the defendant

1. Is either a foreign corporation or not a resident of the state; * * *

§905. Service of summons, if warrant previously granted. If the warrant be granted before the summons is served, personal service of the summons must be made upon the defendant against whose property the warrant is granted, within thirty days after the granting thereof; or else before the expiration of the same time, service of the summons by publication must be commenced, or service thereof must be made without the state, as prescribed by law; and if publication has been, or is thereafter commenced, the service must be made complete by the continuance thereof.

§907. Terms of undertaking on obtaining warrant. The undertaking to be given on the part of the plaintiff, before the granting of the warrant, shall be to the effect that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs which may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least two hundred and fifty dollars.

§910. Contents of warrant; to whom directed. The warrant may be directed either to the sheriff of a particular county, or, generally, to the sheriff of any county. It must require the sheriff to attach and safely keep, so much of the property within his county, which the defendant has, or which he may have, at any time before final judgment in the action, as will satisfy the plaintiff's demand, with costs and expenses. The amount of the

plaintiff's demand must be specified in the warrant, as stated in the proofs on which the warrant was granted. Warrants may be issued at the same time to sheriffs of different counties.

ARTICLE 55

ATTACHMENT: EXECUTING WARRANT

§912. Manner of attaching property and duties of sheriff, generally. The sheriff must execute the warrant immediately, by levying upon so much of the personal and real property of the defendant, within his county, not exempt from levy and sale by virtue of an execution, as will satisfy the plaintiff's demand, with the costs and expenses * * *

§916. Levy upon cause of action, evidence of debt or claim to estate. The attachment may also be levied upon a cause of action arising upon contract; * * *

§917. Method of making levy. A levy under a warrant of attachment must be made as follows: * * *

3. Upon other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same; or, if it consists of a demand, other than as specified in the last subdivision, with the person against whom it exists; or, if it consists of a right or share in the stock of an association or corporation, or interests or profits thereon, with the president, or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or if it consists of a right or interest in an estate of a deceased person arising under the provisions of a will or under the provisions of law in case of intestacy, with

the executor or trustee under the will, or the administrator of the estate.

§918. Certificate of defendant's interest to be furnished.

Upon the application of a sheriff holding a warrant of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a certificate, under his hand, specifying the rights or number of shares of the defendant in the stock of the association or corporation, with all dividends declared or incumbrances thereon; or the amount, nature and description of the property held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires.

§921. Inventory. The sheriff, immediately after levying under a warrant of attachment, must make, with the assistance of two disinterested freeholders, a description of the real property, and a just and true inventory of the personal property, upon which it was levied, and of the books, vouchers, and other papers taken into his custody, stating therein the estimated value of each parcel of real property attached, or of the interest of the defendant therein, and of each article of personal property, enumerating such of the latter as are perishable. The inventory must be signed by the sheriff and the appraisers; and, within five days after the levy, must be filed in the office of the clerk of the county where the property is attached.

ARTICLE 59

ATTACHMENT: PROCEEDINGS AFTER VACATION OF WARRANT
OR DISCHARGE OF ATTACHMENT, OR AFTER JUDGMENT**§969. Satisfaction of judgment from attached property.**

Where an execution against property is issued upon a judgment for the plaintiff in an action in which a warrant of attachment has been levied, the sheriff must satisfy it as follows:

1. He must pay over to the plaintiff all money attached by him, and the proceeds of all sales of perishable property, or of any vessel or share or interest therein, or animals, sold by him, or of any debts, or other things in action collected or sold by him; or so much thereof as is necessary to satisfy the judgment.

* * *

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.

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CHARLES ELMORE CROPLEY
CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1940

No. 212

HURON HOLDING CORPORATION,
a corporation, and **NATIONAL SURE-**
TY CORPORATION, a corporation,

Petitioners,

vs.

LINCOLN MINE OPERATING COMPANY,
a corporation,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT.**

✓ **D. WORTH CLARK, Esq.,**
Washington, D. C.,

SAM S. GRIFFIN, Esq.,
W. H. LANGROISE, Esq.,
E. H. CASTERLIN, Esq.,
Boise, Idaho,

Counsel for Respondent.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 212

HURON HOLDING CORPORATION,
a corporation, and NATIONAL SURE-
TY CORPORATION, a corporation,

Petitioners,

vs.

LINCOLN MINE OPERATING COMPANY,
a corporation,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT.**

I.

Opinions of Courts Below

Opinion of the United States Circuit Court of Appeals for the Ninth Circuit upon the original appeal from verdict and judgment thereon is reported as *Huron Holding Corporation vs. Lincoln Mine Operating Company*, 101 Fed. (2d) 458, wherein said judgment was affirmed.

Opinion of the United States District Court upon motions for judgment against petitioner National Surety Cor-

poration, and for satisfaction of judgment, is reported as *Lincoln Mines Operating Company vs. Huron Holding Corporation* in 27 Fed. Supp. 720.

Opinion of United States Circuit Court of Appeals for the Ninth Circuit (herein involved) is reported as *Lincoln Mine Operating Company vs. Huron Holding Corporation*, et al., in 111 Fed. (2d) 438. It is also found at pages 74-78 of the record.

II.

Jurisdiction

(1) Date of judgments of the District Court is May 4, 1939 (R. 61-62), and of the Circuit Court of Appeals, Ninth Circuit, is April 30, 1940 (R. 79).

(2) Petitioner invokes jurisdiction under the provisions of Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U.S.C.A., Sec. 347a).

(3) Petitioner does not refer to any cases believed to sustain jurisdiction.

Respondent refers to the following cases as opposed to jurisdiction, since the question is whether a judgment of a United States District Court in a tort action is, pending appeal therefrom (and supersedeas thereof) to the Circuit Court of Appeals, subject to garnishment in a foreign (state) jurisdiction, and the law is well settled that it is not.

Wabash Railroad Co. vs. Tourville, 179 U.S. 322.

Wallace vs. McConnell, 13 Pet. 136.

Menees vs. Mathews, 197 Fed. 633.

Franklin vs. Ward, 9 Fed. Cas. 711.

Thomas vs. Wooldridge, 23 Fed. Cas. 986.

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Mack vs. Winslow, 59 Fed. 316.

Lowenstein vs. Levy, 212 Fed. 383.

Ackerman vs. Tobin, 22 Fed. (2d) 541.

U. S. Shipping Board vs. Hirsch L. Co., 35 Fed.
(2d) 1010.

(4) The petitioner asserts that one of the questions presented is (Petition, p. 6):

(a) "Was the Idaho District Court required to recognize and give effect to the attachment proceedings which concededly in all respects complied with and were fully authorized by the laws and decisions of the State of New York?"

No such question is involved. No such concessions were ever made by respondent. Respondent did not concede that the attempted attachment of the Idaho United States District Court judgment, while superseded and pending on appeal to the Circuit Court of Appeals, was fully or at all authorized by the laws and decisions of the State of New York. On the contrary, respondent contended that (1) under the laws of the United States and decisions of the United States Courts it is well settled that such a judgment, superseded and pending appeal to a United States Court, was not attachable by the New York State Court; (2) that the decision in *Erie Ry. Co. vs. Tompkins*, 304 U.S. 64, did not change the rule or make applicable New York law or decisions; and (3) even if it did, the laws and decisions of New York did not

authorize attachment of such judgment. This is shown not only by the partial, incomplete and outside the record quotation from respondent's brief (Petition, pp. 19-20), but by the statement of the Circuit Court of Appeals opinion (R. 75).

No question of comity is or was, involved or passed upon. The only question was and is whether a judgment of a Federal Court in Idaho superseded and appealed to the United States Ninth Circuit Court of Appeals was, prior to decision and mandate of such appellate court, of such character as to be subject to attachment by a New York State court, whose jurisdiction to proceed against respondent was dependent upon the effective attachment thereof.

Respondent did concede that New York *procedure* for an attachment or garnishment was followed; it emphatically never conceded that such procedure was *effective* to constitute a seizure of the appealed judgment or a garnishment of Huron, judgment defendant and appellant petitioner, or to give jurisdiction to the New York court.

Statement

The statement of petitioner (Petition, pp. 1-2) may be accepted.

The Facts

The facts, as stated by petitioner (Petition, pp. 2-5) are accepted, except as follows:

(a) Petition, p. 3, lines 6-12. The *procedural steps* for attachment were followed. Effectiveness thereof under the

statute and decision cited is denied, is not fact but matter of law, and involved in the question presented.

(b) Petition, p. 3, lines 14-15. The garnishee, Huron Holding Corporation, did not admit a judgment indebtedness. It returned, and the Sheriff appraised, only that it was the *defendant* against which judgment was entered, and was unpaid "subject to the rights of said Huron Holding Corporation on the appeal taken by it from said judgment and *now pending* in said court." (Record, 26-27; 30-31). In other words, it denied liability upon the judgment and gave notice thereof and of its pending appeal.

(c) Petition, p. 3, lines 18-19. The record does not show that Huron was doing business only in New York and there had its sole assets. The same off the record misstatement is made at pages 7 and 22. In fact, the record in the trial court, and upon the appeal of Huron from the judgment thereof, shows Huron was doing business in Idaho, without compliance with Idaho law, and claimed ownership of real and personal property in Idaho, held in the name of a "dummy", Alexander Lewis; that on such appeal Huron asserted error with respect to its doing business and abandoned the same on argument; that the chattels for detention of which respondent brought action for claim and delivery in Idaho "were in the possession of appellant's (Huron) agent at the Lincoln Mine in Gem County, Idaho" (*Huron Holding Corporation vs. Lincoln Mine Operating Company*, 101 Fed. (2) 458).

(d) Petition, p. 3, lines 24-26. Huron's certificate did not "acknowledge that it was indebted to the respondent in

the amount of said District Court judgment." As above pointed out, Huron only *acknowledged* that it was judgment defendant; and the judgment was unpaid; it gave notice of appeal pending and in effect it denied any liability thereby, or at most only admitted a contingent liability (R. 30-31).

It should be added to the facts that the jurisdiction of the New York court was wholly dependent upon an effective seizure by garnishment on July 12, 1938, while Huron's appeal was pending, and the judgment superseded. (R. 20; opinion *Lincoln Mines Operating Company vs. Huron Holding Corporation*, 27 Fed. Supp. 720, 721.

Reasons for Denying Writ

The petition does not show any special or important reason for granting it; no conflict of decisions with other Circuit Court of Appeals appears; nor has there been decided an important question of Federal law which has not been, but should be, settled by this Court. Rule 38 (5).

Petitioners do not contend otherwise, but concede in the second question asserted to be involved (Petition, p. 6) that the settled Federal rule is that a Federal judgment may not be attached in a foreign jurisdiction. The basis for this rule is not, as asserted by petitioner (Petition, p. 8), Federal common law, but an intolerable conflict of jurisdictions between Federal and State courts, especially where the suit was, as here, undetermined in the Federal Court, and under the Constitution and laws of the United States was subject to further powers and orders of the Federal Court.

Opinion, Ninth Circuit Court of Appeals,
R. 74, 77-78.

Wabash R. Co. vs. Tourville, 179 U.S. 322,327.

The only possible ground asserted by petitioner for issuance of the writ is a claimed misinterpretation of the rule and effect of the decision of this Court in *Erie Railway Co. vs. Tompkins*, 304 U.S. 64. Specifically that decision excepts from operation of local laws "matters governed by the Federal Constitution or by Acts of Congress." Obviously, as the Circuit Court of Appeals points out (R. 78), the powers of the Federal Courts, and their exercise in a suit therein pending, are matters governed by the Constitution and laws of the United States, and not to be made futile, or the Federal Courts rendered powerless by state attachment; no question of misinterpretation is involved.

Furthermore, even if this Court should determine that local New York law was applicable, such local law is settled that a judgment on appeal, being payable only upon the uncertain contingency of affirmance, is not subject to attachment.

ARGUMENT

Summary of Argument

I. It is settled United States law, and so conceded by petitioner, that a judgment of a United States Court, superseded and pending appeal, is not subject to attachment in a foreign jurisdiction.

II. A motion for satisfaction of a Federal judgment is not required to be answered to raise the question of

law as to whether such judgment while superseded and appealed is subject to attachment in a foreign jurisdiction.

(a) The question was raised and argued by respondent in, and decided by, the District Court and the Circuit Court of Appeals, and grounds for decision were not volunteered.

III. The decision in *Erie Ry. Co. vs. Tompkins*, 304 U. S. 64, does not reverse the rule stated in point I *supra*, nor subject to local State law, Federal procedure, judgment on appeal or courts which are governed by the Constitution and laws of the United States.

(a) The Federal court judgment attempted to be seized by attachment by a New York court was, at the time, superseded and on appeal, and so long as Federal courts' jurisdiction thereof was not completely exhausted, it was governed by the United States Constitution and laws.

IV. The conclusion of reversal by the Circuit Court of Appeals of the judgments of the District Court decreeing satisfaction of judgment, and non-recovery against the Surety petitioner, was correct even if New York law was applicable, since it is settled New York law that a judgment is to be treated as other debts, which, if contingently payable, are not attachable in New York.

(a) The Federal judgment, superseded and appealed, was contingent upon the action of the Federal

appellate court. **Shipman Coal Co. vs. Del. & Hudson Co.**, 219 N.Y.S. 628, 245 N.Y. 567, is not contra, but supports the New York rule.

Point I

The rule is settled that a Federal Court judgment, superseded and pending appeal is not subject to attachment in a foreign jurisdiction.

The respondent was not at any time personally subject to the jurisdiction of the New York State Court, being absent from and non-resident of New York (R. 20, 25). The jurisdiction of the New York Court to enter judgment against respondent and to enforce execution against Huron, garnishee, depends solely upon whether an effective seizure by garnishment proceedings of property of respondent, subject thereto, in New York was had on July 12, 1938.

Pennoyer vs. Neff, 5 Otto. 714, 27 L.ed. 565, 570.

The property attempted to be seized in New York was a judgment in a tort (claim and delivery) action in favor of respondent and against petitioner Huron, rendered by the United States District Court for the District of Idaho, which judgment on July 12, 1938, at the time of attempted seizure by the New York State Court was superseded and pending and undecided, on appeal taken by petitioner Huron to the United States Circuit Court of Appeals, Ninth Circuit. The appeal was not decided until February 7, 1939, after which under Rules 25 and 28 of that Court it was subject to rehearing until mandate issued and was filed in the District Court for Idaho on March 13, 1939. Prior thereto

the New York Court purported, on February 27, 1939, to enter judgment against respondent, and on March 1, 1939, petitioner Huron, as garnishee under the attempted seizure and an execution, paid to the New York Sheriff moneys which it has contended resulted in partial satisfaction of the United States judgment.

The Federal rule is well settled, without conflict or dissent, and indeed conceded by petitioner (Petition, pp. 6, 8) that such United States judgment was not then subject to seizure by the New York court.

Wabash Ry. Co. vs. Tourville, 179 U.S. 322, 327;
45 L.ed. 210, 214.

Wallace vs. McConnell, 13 Pet. 136.

Menees vs. Mathews, 137 Fed. 633.

Franklin vs. Ward, 9 Fed. Cas. 711.

Thomas vs. Woldridge, 23 Fed. Cas. 986.

Henry vs. Mining, 15 Fed. 649.

Mack vs. Winslow, 59 Fed. 316.

Lowenstein vs. Levy, 212 Fed. 383.

Ackerman vs. Tobin, 22 Fed. (2) 541.

U. S. Shipping Board vs. Hirsch Lumber Co.,
35 Fed. (2) 1010.

Point II

A motion requires no answer; whether a United States Court judgment is attachable is a question of law. The Circuit Court of Appeals did not volunteer grounds for its decision.

Petitioner asserts (p. 19) that its motion for satisfaction

of judgment was not answered and therefore admitted, without objection, an effective seizure and payment. Respondent was not required to answer a motion; whether seizure and payment was effective under the circumstances and by the procedure asserted in the motion was a question of law which was presented by respondent, not limited to the ground asserted by petitioner (pp. 19-20) based upon a partial quotation from respondent's brief (not in the record) in the Circuit Court of Appeals. That brief presented, and there were argued in both the District Court and the Circuit Court of Appeals, three main propositions, set forth therein (p. 22), as follows:

"1. Assuming the applicability of New York law, the New York rule may be said to be that a judgment, pending appeal and not presently enforceable by reason of supersedeas bond, is not subject to garnishment in New York since it is not, at that time, a debt presently enforceable and payable, and whether it ever will be is contingent upon the action to be taken by the appellate court, and it is not, at that time, a cause of action, since it cannot be the subject of action to enforce it.

"2. A judgment recovered in a United States court and pending on appeal, with supersedeas, to a United States Circuit Court of Appeals, is not subject to state local law, but to the Constitution and laws of the United States, and to the control and jurisdiction of the Federal Courts, and is not subject to attachment, nor the appealing judgment debtor to garnishment, by a state court; the decisions of the United States Supreme Court so hold; to permit garnishment by a state court would be unwarranted and improper interference with, and make ineffective, the jurisdiction of an appellate court of the United States.

"3. A cause of action in tort (claim and delivery)

is not, prior to action commenced, or while action therefor, is pending, subject to attachment; an action filed in the United States District Court for the District of Idaho is pending until final determination upon appeal."

The Circuit Court of Appeals did not, therefore, volunteer grounds for reversal as asserted by petitioner (p. 20).

Point III

The decision in *Erie Railway Co. vs. Tompkins*, 304 U.S. 64, did not subject Federal procedure nor Federal judgments on appeal to local law. Such appealed judgments, procedure and courts are governed by the Constitution and laws of the United States, not subject to interference by state courts or laws.

Petitioner asserts without argument that the decision of this Court in *Erie Railway Co. vs. Tompkins*, 304 U.S. 64, requires reversal of the rule against garnishment of Federal judgments, and application of New York law. Petitioner ignores the exception stated in the decision:

"Third. Except in matters governed by the Federal Constitution or by Acts of Congress the law to be applied in any case is the law of the State."

The "matter" herein was the decision of a cause of action in tort, of which, pursuant to the Constitution and laws of the United States, the United States Courts had acquired, and were in process of exercising, jurisdiction. So long as that cause was pending in such courts, and said courts had not finally ended with it, so long as something more remained concerning or respecting such cause, or right or property, which, under such Constitution and laws, was within the

power of such courts to do, such courts had the power and duty to protect and preserve such power, property and rights, without interference from the states or state courts, or by local laws. Otherwise, the judicial power of the United States and its courts could be (as was here attempted) defeated and rendered ineffective.

The petitioner Huron originally removed the cause from the Idaho State Court to the United States District Court pursuant to the Constitution and laws of the United States; defended the cause by virtue and in accordance therewith; appealed and superseded judgment pursuant thereto; appealed to such courts for satisfaction of judgment after affirmance on appeal under such laws.

At the time of garnishment whether petitioner Huron owed anything, whether respondent had anything in New York, whether the New York court had acquired jurisdiction by the seizure of anything, was contingent and uncertain, dependent upon what action, affirmance or reversal, was taken in the future by the Circuit Court of Appeals pursuant to its powers under the Constitution and laws of the United States. If it reversed, petitioner Huron was not indebted to respondent, respondent had no seizable property in New York, the New York court had seized nothing and was deprived of jurisdiction to enter the judgment already entered, and its execution rendered nugatory.

On the other hand, if the judgment was validly and effectively seized, petitioner Huron, by a foreign sovereignty, was deprived of the effective right of appeal granted by Fed-

eral law; by such sovereignty required to pay that which the Federal appellate court might have held it did not owe; deprived of the right of retrial after reversal granted by Federal law.

Such interpretation of the Erie-Tompkins decision destroys the independence of the judicial department of the United States and places such department under the supervision and control of local law and courts; interferes with and invades the authority of the United States and its courts.

An examination of cases decided since the opinion in the Erie-Tompkins case discloses no tendency to extend the doctrine thereof to the situation here. On the contrary, this Court very carefully pointed out in *Neirbo Co. vs. Bethlehem Corp.*, 308 U.S. 165:

“* * * we are not subjecting federal procedure to the requirements of New York law.”

The United States law provides for the supersedeas bond given by petitioners and required, as did the bond, that the appeal be prosecuted to effect and petitioners answer all damages, interest and costs otherwise (Title 28, Sec. 869 U.S.C.). The only way by which an appeal can be prosecuted to effect is by securing reversal by the United States Court of Appeals, otherwise the condition of the bond is broken and the Surety is absolutely liable to respondent.

Montgomery vs. Am. Employers Ins. Co., 22 Fed. Supp. 476; 101 Fed. (2d) 1005; cert. den. 307 U.S. 629.

The debt of the Surety petitioner to respondent under the

bond become absolute upon the mandate of the appellate court, and such debt was never attempted to be impounded in New York.

If the appeal could be rendered nugatory and without effect by the vis major of the New York court in seizing the judgment before the United States appellate court could act, it would either subject petitioners to damages under the United States statute and the bond or effectively prevent the Federal Court from assessing damage or entering judgment against the surety. The purpose of the bond was that respondent "should sustain no loss in consequence of any ineffectual effort to reverse the decree by reason of his hand being stayed pending such effort."

Louisville N. A. & C. Ry. Co. vs. Pope., 74 Fed. 1.

Respondent's hands have been stayed by Federal law since the appeal, and until this moment; it was entitled to judgment against the surety upon the bond. It cannot be made to suffer damage by the unwarranted action of the New York court; its claim against the Surety was not, in any event seized by the New York court, and the District Court was clearly in error in failing to enter judgment against the Surety petitioner.

Point IV

Even if the local New York law be applied, it is settled New York law that a Federal judgment, superseded and appealed, is only contingently payable and not subject to attachment in New York.

But even though this Court should hold, or had the Circuit Court of Appeals held, that New York law was applicable, the conclusion that the District Court's judgments be reversed would have followed, because under New York law the appealed Federal judgment was not subject to garnishment therein.

The case of *Shipman Coal Co. vs. Del. & Hudson Co.*, 219 N.Y.S. 628 is the sole reliance of petitioner. It is opposed by *Heyl vs. Taylor*, 117 N.Y.S. 916. It was affirmed without opinion by the New York Court of Appeals, 245 N.Y. 567, 157 N.E. 859, upon a question certified thereto which did not disclose that a judgment of a United States Court was involved.

The lower New York Court was primarily concerned with the situs of a judgment, which is not in issue here. It did, however, determine also that under New York law a judgment was not attachable as such, but as a "debt" or "cause of action arising upon contract" and

"Since the judgment, even though recovered in another court, represents a cause of action, debt or demand, and it is not an 'instrument for the payment of money' within section 916, Civil Practice Act, it ought to be treated in all respects like any other debt. * *"

The New York court was dealing with a judgment with which the courts having jurisdiction had nothing further to do, which was in all respects finally determined, then due and enforceable, not stayed by supersedeas, not contingent upon the result of appeal, reversal, or retrial. It was then an enforceable, absolutely payable debt. And because it was

in such condition the decision held that it was capable of control and enforcement by the New York courts by reason of the domicile and property there of the judgment debtor.

Not so in this case; the jurisdiction of the Federal Courts had not ended; the cause was not finally determined in those courts; the judgment was not, when attempted to be seized, or when petitioner, without raising the question, made payment as garnishee, due or enforceable in New York or elsewhere, was stayed by supersedeas, was contingent upon the result of appeal, was not absolutely payable then or in the future. Petitioner, by appeal and supersedeas, had denied the judgment's validity or binding character, or that it owed or was indebted to respondent in any amount. Whether it ever would owe anything to respondent, or how much, was contingent upon the future, unpredictable, decision of the Circuit Court of Appeals; if reversed it owed nothing, the cause was subject to dismissal or a new trial, the results of which were also contingent and unpredictable. In the Shipman decision, it is said that when a judgment is entered:

"a legal obligation * * * arises on the part of the defendant to pay it."

No such obligation here existed, since it was contingent upon the action of the appellate court.

Furthermore, the law of New York cited by petitioner reads that only a contract cause of action or debt which, absolutely and not contingently, "belongs to the defendant" (Sec. 916, Petition, p. 13), and is "owing to the defendant" (Sec. 918, Petition, p. 14), is attachable. The judgment here but contingently belonged or was owed to respondent.

The Shipman decision states that a judgment "ought to be treated *in all respects* like any other debt." So treated the New York law is settled, without known dissent, that no right exists in New York for the attachment of debts (and therefore judgments) which are not, at the time of attachment, due and absolutely payable, or whose payment is dependable upon any contingency.

"It is well settled that an indebtedness is not attachable unless it is absolutely payable at present, or in the future, and not dependable upon any contingency."

Herman & Grace vs. City of N. Y., 114 N.Y.S. 1107;
affirmed 199 N.Y. 600, 93 N.E. 376.

Reifman vs. Warfield Co., 8 N.Y.S. (2) 591.

Sheehy vs. Madison Square Garden Assn., 266 N.Y.
44, 193 N.E. 633.

"* * If a liability is contingent, no attaching rights exist. * *

"There can, then, be no attachment of, or levy upon, a contingent right, which may or may not become a cause of action according to the occurrence or non-occurrence of a future event. The attachment failing, the order of publication falls with it."

Frederick vs. Chicago Bearing Metal Co.,
223 N.Y.S. 824, 224 N.Y.S. 629.

CONCLUSION

The writ should not be allowed because:

(1) It is settled law that a Federal judgment, superseded and pending appeal, is not subject to attachment by a New York Court.

(2) No interpretation of *Erie Ry. Co. vs. Tompkins* requires reversal of such settled law, nor the subjection of Federal judgments, courts or procedure to the interference of state courts.

(3) In any event, the conclusion and judgment of the Circuit Court of Appeals was correct, since the appealed Federal judgment was not, by the settled law of New York, subject to seizure by New York courts.

(4) There exists no special or important reason, no conflict of decisions, nor unsettled important question of Federal law, requiring consideration by this Court.

The petition should be denied.

Respectfully submitted,

D. WORTH CLARK,
Washington, D. C.,

SAM S. GRIFFIN,

W. H. LANGROISE,

E. H. CASTERLIN,
Boise, Idaho,

Counsel for Respondent.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940

No. 212

**HURON HOLDING CORPORATION and NATIONAL SURETY
CORPORATION,**

Petitioners,

vs.

LINCOLN MINE OPERATING COMPANY

Respondent.

BRIEF FOR RESPONDENT

D. WORTH CLARK, ESQ.,
Washington, D. C.

W. H. LANGROISE,

SAM S. GRIFFIN,

E. H. CASTERLIN,
Boise, Idaho,

Counsel for Respondent.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940

No. 212

HURON HOLDING CORPORATION and NATIONAL SURETY
CORPORATION,

Petitioners,

vs.

LINCOLN MINE OPERATING COMPANY

Respondent.

BRIEF FOR RESPONDENT

Opinions of the Courts Below.

In an action in claim and delivery in the United States District Court for the District of Idaho, Southern Division, Lincoln Mine Operating Company, plaintiff, recovered a money judgment against Huron Holding Corporation, defendant, on March 3, 1938. This judgment was affirmed by the Circuit Court of Appeals, Ninth Circuit, on February 7, 1939, by an opinion reported in 101 Fed. (2nd) 458.

On Huron Holding Corporation's motion for satisfaction of judgment and on Lincoln Mine Operating Company's motion for judgment against surety on appeal bond after remand, the District Court granted the first motion and denied the second motion in an opinion reported in 27 Fed. Supp. 720.

The Circuit Court of Appeals for the Ninth Circuit then reversed the District Court in an opinion reported in 111 Fed. (2nd) 438, which is the opinion now on review. For this opinion see Record at pages 74 to 78.

Nature of the Case.

The instant proceeding will determine if a money judgment returned in a Federal court in one State, while on appeal and undecided by the Federal Appellate court and while payment of said judgment is stayed by a bond conditioned on the successful prosecution of the appeal, can be attached by the judgment creditor's creditor in a State court of another State wherein the judgment debtor resides and the judgment creditor is a non-resident. The Petitioner contends affirmatively and the Respondent contends negatively.

Parties.

The parties are as stated by the Petitioner and they will be referred to herein as in Petitioner's Brief so that there will be no confusion. (Petitioner's Brief, page 3).

Facts.

The Respondent accepts the facts as stated by the Petitioners with the following corrections and additions.

A warrant of attachment was issued out of the State Court on July 12th, 1938, but it was not "duly" issued, or issued pursuant to the provisions of the New York Civil Practice Act, Section 902, et seq., (Petitioners' Brief, page 4, lines 7 et seq.) and, consequently, all proceedings in the State Court were and are nil.

The mandate of the Circuit Court upon its affirmance of the judgment of March 3, 1938, was dated March 9th, 1939. (R. 6-8).

Summary of Argument.

Point I—The jurisdiction of the New York State Court in the action brought by the Trust Company against Lincoln depended solely upon the attachment proceedings 4

Point II—The attachment proceedings in the New York State Court were void for the reason that on June 28, 1938, when the proceedings were initiated and on July 12, 1938, when the attachment was levied, the judgment debt was not attachable because (a) it was not absolutely payable at the time or in the future, and (b) payment of the debt was dependent upon a contingency which had not then happened..... 4

Point III—The jurisdiction of the District Court of the United States, and, the right of the plaintiff to prosecute his suit in that Court having attached, that right cannot be arrested or taken away by any proceedings in another court..... 11

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Conclusion 20

POINT I.

The jurisdiction of the New York State Court in the action brought by the Trust Company against Lincoln depended solely upon attachment proceedings.

This is conceded by the Petitioners in their brief in Point I at page 9, where it is stated:

"The New York Court had power to enforce its attachment proceedings against Huron, a New York corporation, and on that power was based its jurisdiction to bind the non-resident judgment creditor, Lincoln, to the extent of Lincoln's interest in the judgment debt attached."

POINT II.

The attachment proceedings in the New York State Court were void for the reason that on June 28, 1938, when the proceedings were initiated and on July 12, 1938, when the attachment was levied, the judgment debt was not attachable because (a) it was not absolutely payable at the time or in the future, and (b) payment of the debt was dependent upon a contingency which had not then happened.

Petitioners entire case is predicated upon the false premise that the State Court acquired jurisdiction and that the attachment was valid. But the attachmen was not valid,, and, therefore, the State Court had no jurisdiction.

In *Shipman Coal Company vs. Delaware & Hudson Co.*, 219 N.Y.S. 628; affirmed without opinion in 245 N.Y. 567, 157 N.E. 859, the Court said:

“**** (it—a money judgment) is attachable as a ‘debt, a cause of action or demand’ by service of the warrant upon the debtor or person against whom the demand exists ****”

“Since the judgment **** represents a cause of action, debt or demand, and it is not an “instrument for the payment of money’ within Section 916 Civil Practice Act, *it ought to be treated in all respects like any other debt*, chose in action or intangible personal property****.” (Italics ours).

That being true, and the Shipman case is strongly relied upon by the Petitioners, we may examine the cases to ascertain when and under what circumstances a “debt” is attachable in New York.

In *Herman & Grace vs. City of N. Y.*, 114 N.Y.S. 1107, affirmed in 199 N.Y. 600, 93 N.E. 376, the New York Court used the following language:

“An attachment * * applies only to an amount which has become an indebtedness to the defendant whose property is attached, *at the time of the levy*, and not to an indebtedness which *may* accrue after the levy of attachment. * *

“It (contract payment) was not therefore a debt, or, in the language of the Code, a chose in action, when the attachment was levied, because it had not then become due, and would not become due until completion of the contract. *It is well settled that an indebtedness is not attachable unless it is absolutely payable at present, or*

in the future, and not dependable upon any contingency. Whether it would ever become a debt depended upon the contingencies that the contractors would complete their work, and, if they did not so complete, whether the city would elect to forfeit the contract, or would proceed to complete it at the contractor's expense." (Italics ours).

In *Frederick vs. Chicago Bearing Metal Co.*, 223 N.Y.S. 824, the New York Court held that though profits may never accrue, the *right* to them, if they did accrue, was existent and not contingent upon there ever being any profits. Upon appeal in opinion reported in 224 N.Y.S. 629, the Appellate Court said:

"But notwithstanding its putative value, it is merely a contingency, *which may never eventuate into a right.* It is a possibility of profit, but nothing may ever be payable under it. *If the liability is contingent, no attaching right exists.* Here there is no liability presently fixed to pay anything except upon the accident of profits accruing * *

"There can, then, be no attachment of, or levy upon, a contingent right, which may or may not become a cause of action according to the occurrence or non-occurrence of a future event. The attachment failing, the order of publication falls with it." (Italics ours).

In *Reifman vs. Watfield Co.*, 8 N.Y.S. (2) 591, after citing the case of *Herman and Grace vs. City of N.Y.*, *supra*, and *Frederick vs. Chicago Bearing Metal Co.*, *supra*, the Court stated:

"Even were the Exchange obligated to pay to the defendant the proceeds of the sale **** the right of the defendant to such proceeds would be contingent and equitable. **** There is no liability presently fixed whereby the Exchange is obligated to pay anything to the corporation. *Contingent liabilities may not be attached.*

"It is well settled that an indebtedness is not attachable unless it is *absolutely payable at present or in the future, and not dependable upon any contingency.*"

(Italics ours):

In *Sheehy vs. Madison Square Garden Assn.*, 266 N.Y. 44, 193 N.E. 633, which involved the right to attach moneys to become due under a contract to conduct rodeos over a period of years for the sum of \$65,000.00 payable in installments, the Court said:

"There was therefore at that time (of attachment) no money or property right actually in existence to which the warrant could attach * * *

"Plaintiffs * * urge that there was some property right arising out of the contract in the nature of a chose in action which was leviable. Johnson's right to payment at the time was entirely inchoate, contingent upon performance of the conditions with which it was his duty to comply. *He had no enforceable rights either in praesenti or in futuro.* Until he had satisfactorily performed, he was entitled to nothing. These were dependent conditions. Performance must precede payment. Choses in action are not ordinarily leviable.

There must be a statute granting the right. Our statute (Civil Practice Act, section 916) provides that an attachment may be levied upon causes of action arising upon contract. But at the time of the levy Johnson had no cause of action; nothing but the right to earn money in the future. * * The present case is indistinguishable from (*Herman & Grace vs. City of N.Y. supra.*)” (*Italics ours.*)

In 28 Corpus Juris at page 241, under the title Garnishment, it is stated that plaintiff can acquire no greater rights against the garnishee than are possessed by the principal defendant.

At the time the Trust Company instituted its action in the State Court the obligation of Huron, the judgment debtor, to Lincoln, the judgment creditor, was not “absolutely payable at present or in the future” and payment was dependent upon a contingency.

At the time of the attachment, the payment of the debt due from Huron to Lincoln was stayed by a bond under the terms of which the judgment creditor could not enforce payment until some future time, and then only if the judgment debtor should “fail to make good its plea” on appeal. (R. 6) Whether the judgment debt would ever become payable depended at the time of the attachment on a contingency, viz., the decision of the Circuit Court. This decision was not rendered until February 7, 1939, and the mandate was not returned to the District Court until March 13, 1939. (R. 6-8).

If the attachment was not good at the time of the levy, it could never be made good in the future upon the happening of any event excepting a new levy. The decision of the Circuit Court did not and could not make the previous levy valid.

At all times Huron recognized the fact that the judgment debt was not due at the time of the levy and that it would not become due in the future except upon the happening of a contingency. And by reason of the following record in the State Court, the Trust Company was advised of that fact. When Notice of Property Attached (R. 29) was served upon Huron by the Sheriff of New York County, Huron made it written Certificate dated July 15, 1938 (R. 30) to the effect that it was the judgment debtor named in the judgment of March 3, 1938, and "that said judgment is still unpaid, subject to our rights on the appeal taken by us from said judgment and now pending in said court." (R. 30-31)

It is to be noted that Huron did not say it owed Lincoln any money by reason of the said judgment. It merely said it was the judgment debtor and, in effect, it would owe the judgment debt to Lincoln in the future if, as and when the Circuit Court should so decide. Clearly a statement that Huron owed no money at the time, and that any future debt was contingent.

In the Inventory and Appraisement dated July 22, 1938, (R. 26) the appraisers described the property exactly as it was in Huron's Certificate, and stated "that said judgment (of March 3, 1938) is still unpaid—subject to the rights of

said Huron Holding Corporation on the appeal taken by it from said judgment and now pending in said court." (R. 27).

At the time the garnishment proceedings were commenced, Lincoln could not have required any payment of money from Huron. Therefore, it follows that the Trust Company could not force any payment and could only acquire whatever rights Lincoln had. These rights were contingent and a levy upon a contingent right will not sustain the jurisdiction of the State Court.

Petitioners base their contention that the attachment proceedings are valid on *Shipman Coal Company vs. Delaware & Hudson Co.*, *supra.*, and for that purpose have found it necessary to supply facts which the Court did not consider necessary in disposing of that action, or the question certified to the Appellate Court.

The *Shipman Case* held:—that judgments recovered by non-residents against a corporation in an action in a Federal Court in Pennsylvania are subject to attachment in New York in an action against the judgment debtor and judgment creditor, without going into the question of whether the debt was due, or payment of the debt was stayed by a bond on appeal, or payment of the debt was dependent upon a contingency.

The Court further held that the situs of a debt is where the debtor is found, and that in New York a judgment debt is property subject to attachment. But the Court did not couple these holdings with the conditions we have here.

The Court probably omitted the facts supplied by the Petitioners because it did not reverse the previous holdings of the Court that a debt is not attachable unless it is absolutely payable at present or at some future time, *and* not dependable upon any contingency. And if the Court did intend to reverse the previous holdings, it did not thereafter follow the Shipman case on that point, but firmly held to the former position. Therefore, the Shipman case is not authority on the point in question, because it neither reversed the former holding nor was followed thereafter on that point if it did reverse.

We find none of the cases cited by Petitioner holding directly contrary to the principle we have just discussed.

POINT III.

The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that court having attached, that right cannot be arrested or taken away by any proceedings in another court.

The facts in *Wallace vs. M'Connell*, 13 Pet. 136, 10 L. Ed. 95, show that M'Connell sued Wallace in a United States Court upon a promissory note, and while the cause was still pending, Wallace was garnished in an action in an Alabama state court. Wallace then claimed an abatement of the Federal suit to the extent of the garnishment. The United States court refused and entered judgment. The Supreme Court of the United States affirmed and stated:

"The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that court having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice. * * * * * Where the suit in one court is commenced prior to the institution of proceedings under attachment in another court, such proceedings cannot arrest the suit. * * This * * is essential to the protection of the rights of the garnishee and will avoid all collisions in the proceedings of different courts having the same subject matter before them. In the case now before the court, the suit was commenced prior to the institution of proceedings under the attachment."

In passing upon this question, the Ninth Circuit Court of Appeals having had the benefit of oral argument and the opportunity of discussion, observed that Huron did not seriously question that federal judgments have been held not subject to garnishment in foreign jurisdictions, (*Lincoln Mine Operating Company vs. Huron Holding Corporation*, 111 Fed. 2nd. 438, 440) and cited the following cases:

Wabash Railroad Co. vs. Tourville, 179 U.S. 322,
21 S. Ct. 113, 35 L. Ed. 210;

United States Shipping Board Merchant Fleet Corp. vs. Hirsh Lumber Co., 59 App. D.C. 116,
35 Fed. 2nd, 1010;

Mack vs. Winslow, 6 Cir., 59 Fed. 316, 319;

Henry vs. Gold Park Mining Co., C.C. Colo., 15
Fed. 649, 650;

Thomas vs. Woolridge, 23 Fed. Cas. 986, 987, No.
13, 918;

Franklin vs. Ward, 9 Fed. Cas. 711, No. 5055;

Freeman, Judgments, 7th Ed. Section 622.

When the action was commenced in the State Court, the action resulting in the judgment of March 3, 1938, was pending in the District Court.

Section 12-606, Idaho Code Ann., provides:

"An action is deemed to be pending from the time of its commencement *until its final determination upon appeal*, or until time for appeal has passed, unless the judgment is sooner satisfied." (Italics ours).

In *McDonald vs. McDonald*, 56 Ida. 444, 457, 55 Pac. 2nd. 827, the Supreme Court of Idaho made the following statement respecting this statute:

"There remains for consideration the question as to whether the district court had jurisdiction to entertain the 'Petition for Modification of Decree.' The decree did not award alimony to respondent; it had become final by operation of law, no appeal having been taken, and the time for modification or amendment as provided by statute having expired."

California has an identical statute. (Code Civil Procedure 1872, Sec. 1050; Kerr's Code, Sec. 1050; Deering's Code 1931, Sec. 1050). The Supreme Court of California in *Naftzger vs. Gregg*, 33 Pac. 757, stated:

“ *** the judgment *** *had not become final* with reference to the subject matter thereof as the time for appear therein had not expired ***.”

And the California court passed upon the point directly in *Arp vs. Blake*, 218 Pac. 773, 777, and stated:

“The garnishment mentioned in the third cause of action as having been served on Arp in 1916 was served pending the appeal in the case of *Blake vs. Arp*. In the case of *Waples-Platter Grocer Co. vs. Tex. & P. Ry. Co.*, 62 S.W. 265, the complaint sounded in unliquidated damages. Garnishment was served pending appeal, and we think the court correctly stated the rule under such circumstances as follows: ‘The effect of the appeal was to deprive the judgment of its finality, and it operated to keep alive the case as one of tort as it existed before the judgment was rendered.’”

The Idaho statute last mentioned was adopted in 1881 and follows the California statute of 1872. Therefore, the interpretations of the California courts are applicable and of weight.

The judgment of March 3, 1938, was final for the purpose of appeal, but it was not final in the sense that it constituted the final liquidation of a tort claim, the claim for damages stated in the pleading which commenced the action in the District Court.

The facts in *Waplee-Platter Grocer Co. vs. Tex. & P. Ry. Co.*, 62 S.W. 265, 59 L.R.A. 353, cited by the California Court in *Arp vs. Blake*, *supra.*, disclose that Downtain sued

the railroad for damages and that the Grocer Company sued Downtain and garnished the railroad company (1) after suit was commenced but before judgment in the trial court; (2) and again after judgment against the railroad company and before appeal was perfected; (3) and again after affirmance on appeal but before petition for rehearing was overruled.

In holding that none of the garnishments were good, the Texas Supreme Court said:

"The demand" (of Downtain) "being uncertain, is not made certain until the amount is fixed by a final judgment of the court; that is to say, a judgment not merely final in the sense that an appeal lies therefrom, but a judgment final in the sense that it has reached that stage in judicial procedure when it can neither be set aside nor reversed upon appeal * * 'appeal or writ of error, whether prosecuted under cost or supersedeas bond, during pendency, deprives a judgment of that finality of character in support of the right or defense declared by it * ' * * The Court of Civil Appeals" in (in *Kreisle vs. Campbell*, 32 S.W. 581) * * "held in accordance with our opinion."

See also:

Dibrell vs. Neely, 61 Miss. 218.

Kreisle vs. Campbell, 32 S.W. 581 (Tex.)

Burke vs. Hance, 76 Tex. 76, 18 Am. St. Rep. 28.

POINT IV.

Erie Railroad Co. vs. Tompkins, 304 U.S. 64, has not changed the rule that a federal judgment may not be attached in a foreign jurisdiction.

The Erie case, *supra*, plainly states at page 78, that "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."

Art. III, Sec. I of the Constitution of the United States provides:

"The judicial power of the United States shall be vested ***** in such inferior courts as the congress may from time to time ordain and establish ****."

Art. III, Sec. 4, of the same document provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties ***; to all cases *** between citizens of different states ****."

Art. I, Sec. 8, provides:

"The Congress shall have power **** To constitute tribunals inferior to the Supreme Court. *****

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Congress has provided for appeals, for cost and supersedeas bonds (28 U.S.C. 869, 874), for executions (28 U.S.C. 727, 729), and in this connection has vested the Federal Courts with power and authority necessary for the "trial and disposition of the cause." (28 U.S.C. 729).

In a long line of decisions the Federal Courts have carefully protected federal jurisdictions from interference by state courts, or courts of other jurisdictions.

In *Collin County Nat. Bank vs. Hughes*, 152 Fed. 414, it was held that the jurisdiction of a federal court over the subject matter of and the parties to a judgment includes the power to enforce it, continues until it is satisfied, and may not be destroyed or impaired by the legislation of the states.

In *Riggs vs. Johnson County*, 6 Wall. 166, 187, appears this language:

"Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution."

and at page 194,

"Authority of the Circuit Courts to issue process of any kind which is necessary to the exercise of jurisdiction and agreeable to the principles and usages of law, is beyond question, and the power so conferred cannot

be controlled either by the process of the state courts or by any act of a State legislature."

In *Wayman vs. Southard*, 10 Wheat, 1, 22, appears the following statement:

"The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until the judgment shall be satisfied."

and in that case the Court held that Congress has, by the Constitution, exclusive authority to regulate the proceedings in the courts of the United States; and the States have no authority to control those proceedings except so far as the state process acts are adopted by Congress, or by the courts of the United States under the authority of Congress.

To the same end that the jurisdiction of a Federal court once lawfully acquired may not be destroyed or restrained by legislation of a State, because that jurisdiction is granted by the Constitution and the Acts of Congress which are the supreme law of the land, see

Barber Asphalt Paving Co. vs. Morris, (CCA 8)
132 Fed. 945;

Brun vs. Mann, 151 Fed. 145;

Chicot Company vs. Sherwood, 148 U.S. 529, 533,
534.

In the recent case of *West et al. vs. American Telephone and Telegraph Co.*, decided by this Court on December 9, 1940, it is stated that "the obvious purpose of Sec. 34 of the Judiciary Act is to avoid the maintenance within a state of

two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship."

And in *Neirbo Co. vs. Bethlehem Corp.*, 308 U.S. 165, 175, is found this statement:

"In finding an actual consent by Bethlehem to be sued in the courts of New York, federal as well as state, we are not subjecting federal procedure to the requirements of the New York law."

It is evident that the Erie case intended to prevent two systems of law in the same jurisdiction and did not intend to subject a federal court and its jurisdiction to the requirements of a state law. The Erie case does not deprive the District Court of its rights under the Constitution and laws of Congress to enter judgment against the National Surety Corporation on the broken conditions in its supersedeas bond. When Huron failed to "make its plea good" on appeal the condition of the bond was broken and the District Court, having jurisdiction of the subject matter, was bound to retain that jurisdiction and enter judgment accordingly without interference from any state court.

If Huron had lawfully satisfied the judgment of March 3, 1938, while it was on appeal in the Circuit Court, it should have so informed the Court because the question submitted to the appellate court had become moot. But Huron did not do so and chose to gamble on the outcome. It was a direct interference with the processes of the federal courts.

Conclusion.

For the above reasons, the Circuit Court of Appeals for the Ninth Circuit should be sustained in its opinion and judgment entered herein, and the District Court should proceed to dispose of the case in conformity with the decision of the Circuit Court and without interference from the process of any other court.

Respectfully submitted,

D. WORTH CLARK, ESQ.,
Washington, D. C.

W. H. LANGROISE,

SAM S. GRIFFIN,

E. H. CASTERLIN,
Boise, Idaho,

Counsel for Respondent.

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JOSEPH CROPLEY
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 212

HURON HOLDING CORPORATION,
a corporation, and NATIONAL SURE-
TY CORPORATION, a corporation,

Petitioners,

vs.

LINCOLN MINES OPERATING COMPANY,
a corporation,

Respondent.

PETITION FOR REHEARING

WILLIAM H. LANGROISE,

SAM S. GRIFFIN,

ERLE H. CASTERLIN,

J. B. ELDRIDGE,

Boise, Idaho,

Counsel for Respondent.

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LINCOLN MINES OPERATING COMPANY,
a corporation,

Respondent.

PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner hereby herein petitions the Court for a rehearing in said cause and for ground of petition states:

STATEMENT

This Court reversed the Circuit Court of Appeals for the Ninth Circuit on the 3rd day of February, 1941, reversing two judgments of said Circuit Court, entered April 30th, 1940 (Tr. 79) which had reversed the District Court of

Idaho, Southern Division, on judgments entered May 4th, 1939 (Tr. 61-62).

One of the said District Judgments granted a motion made by the petitioner Huron Holding Corporation for satisfaction of a judgment entered March 3rd, 1938, in the District Court in favor of the respondent, (Tr. 1-2). The other judgment of said District Court denied the respondent's motion for judgment against the petitioner National Surety Corporation (Tr. 46).

FACTS

The respondent, Lincoln Mine Operating Company, never received any notice at any time or at all other than, that a void judgment would be taken against it if it failed to appear, upon a summons and complaint issued by the State Court of New York and served on it in Idaho.

The garnishee Huron Holding Corporation was guilty of negligence, in that it failed to discharge its duty to respondent, the Idaho Corporation, by not notifying it that it had been garnished and cannot on that account have judgment against it satisfied on account of the attachment proceedings in the State of New York.

Balk vs. Harris, 198 U. S. 215, 49 Law Ed. 1023.

On the 3rd day of March, 1938, Lincoln Mine Operating Company, respondent, obtained judgment in the District Court of the United States for the District of Idaho, Southern Division; against Huron Holding Corporation, petitioner, for the sum of \$6,730.70 and costs (Tr. 1-2).

Respondent made a motion in said cause and court for a judgment against petitioner on Appeal Bond given by National Surety Corporation, petitioner herein. Said motion was filed in the United States District Court for the District of Idaho, March 14, 1939 (Tr. 33-35).

In response to the motion for judgment in said cause against petitioner herein as Surety, petitioner moved the Court for satisfaction of judgment (Tr. 9-16). The transcript is silent as to when said motion for satisfaction of judgment was filed, but it was within a few days after motion for judgment on appeal bond was entered, March 14, 1939 (Tr. 33-35).

In the motion for satisfaction of judgment aforesaid by petitioner against respondent herein reference was made to a certain suit by Manufacturers Trust Company vs. Lincoln Mine Operating Company and attachment proceedings thereon. The complaint referred to upon which Manufacturers Trust Company obtained its judgment against Lincoln Mine Operating Company, respondent herein, is set out in full (Tr. 18-19).

An examination of this complaint discloses the action to be a straight action in personum praying for and demanding a personal judgment against respondent herein. In said cause a summons was issued out of the Supreme Court of the State of New York in which said cause was filed and served on respondent herein, an Idaho Corporation, in Idaho, to which was attached a copy of the complaint informing the respondent that a personal judgment was sought against it in a straight action in personum (Tr. 17). Proof of said service (Tr. 20-21). No notice or mention whatever of any

attachment proceedings contemplated or otherwise was disclosed in the summons or the complaint to which it was attached. No information was ever given to the respondent in this cause that an attachment proceeding had been instituted, or would be instituted in connection with said matter. Said summons was served on the 18th day of July, 1938. (Tr. 20-21). The first and only notice ever obtained by respondent that an attachment proceeding had been taken against its property in New York or elsewhere, was that received by it when the motion of petitioner was filed for satisfaction of judgment, March 13, 1939, almost a year, after the attachment proceedings by Manufacturers Trust Company against respondent herein (Tr. 33-35).

No constructive service by publication, or otherwise, was ever made in the attachment proceeding taken by the Manufacturers Trust Company against Lincoln. The only affidavit filed for warrant of attachment was that of W. L. Schneider, June 29, 1938 (Tr. 19-20). Following the affidavit aforesaid warrant of attachment issued July 12, 1938 (Tr. 24-25). Prior to the service of said summons July 18, 1938, as aforesaid, *no affidavit was filed in said cause showing that any property of the respondent had been levied upon in said cause.* The complaint of Manufacturers Trust Company against Lincoln being a straight action in personum demanding a personal judgment, and the respondent never having received any notice of any attachment proceedings and realizing as it did, that the service or process of the State Court of New York, served against it, in the State of Idaho, wherein a personal judgment was to be taken against it,

would be absolutely void and of no effect, defaulted in said cause, and made no appearance therein, which it had a perfect right to do.

POINTS IN ISSUE

The petitioner herein contends that the garnishee, Huron Holding Corporation, in the garnishment proceedings in the State of New York was guilty of negligence in not notifying Lincoln Mine Operating Company, respondent herein, that its judgment against Huron Holding Corporation had been attached and it had been garnisheed and on that account Huron Holding Corporation may not have the judgment obtained against it or its surety satisfied.

This Court in *Harris vs. Balk*, 198 U. S. 215, 49 Law Ed. 1023 said:

"But most rights may be lost by negligence, and if the garnishee were guilty of negligence in the attachment proceeding, to the damage of Balk, he ought not to be permitted to set up the judgment as a defense. Thus it is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment. This duty is affirmed in the case above cited of *Morgan v. Neville*, 74 Pac. 52, and is spoken of in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 Law ed. 1144, 19 Sup. Ct. Rep. 797, although it is not therein actually decided to be necessary, because in that case notice was given and defense made. While the want of notification by the garnishee to his own creditor may have no effect upon the validity of the judgment against the garnishee (the proper publication being made by the plaintiff), we think it has and ought to have an effect upon the right of the garnishee to avail himself of the prior judgment and his payment

thereunder. *This notification by the garnishee is for the purpose of making sure that his creditor shall have an opportunity to defend the claim made against him in the attachment suit. Fair dealing requires this at the hands of the garnishee.*"

The petitioner herein contends that in so far as a personal judgment having been rendered against it is concerned, such judgment upon such process is void and of no effect.

Pennoyer vs. Neff, 95 U. S. 714, 24 Law Ed. 565.

The principles laid down in said cause have never been deviated from by this Court.

The petitioner herein contends that no notice whatever of said attachment proceedings having been given it, either constructively or otherwise, has denied this petitioner due process of law, has denied it its day in Court and deprived it of its property without an opportunity to be heard.

The petitioner herein further contends that if the attachment statutes of the State of New York provide for service in attachment proceedings against a citizen of another State, may be maintained upon a summons and complaint for a personal judgment only, and without notice of attachment, constructive or otherwise, such statutes contravene the Constitution of the United States and are void, as will more particularly hereinafter appear.

The complaint and summons, and attachment proceedings without any notice whatever to respondent by the State Court of New York, are two separate and distinct matters in so far as they relate to process and proper judicial proceedings. The complaint and summons being an action in

personum in so far as respondent is concerned, was the only proceeding instituted against it by the State Court of New York, of which respondent had any notice, the judgment obtained therein, unless it was made valid by attachment, was a complete nullity. Respondent contends the attachment proceeding was separate and distinct from the money judgment demanded in the action for the reason that it never had any notice thereof. It must be conceded had there been no attachment proceedings the complaint and summons of Manufacturers Trust Company and judgment taken thereon by process served in Idaho would be an absolute nullity. This being a nullity, the attachment proceeding without notice of any kind whatever could not blow the breath of life in a null and void judgment obtained upon a straight action in personum. Respondent contends that due process of law demands some valid notice of the attachment proceedings in New York would have to be brought home to the respondent in Idaho, which was never done at all.

The Huron Holding Corporation, a corporation against which Lincoln had its judgment, is nothing but a subsidiary and only a part of Manufacturers Trust Company itself. They have intermingling officers and Manufacturers Trust Company owns and controls Huron Holding Corporation. They are identical, one and the same. In *Ojus Mining Company vs. Manufacturers Trust Company and Alexander Lewis*, 82 Fed. (2nd) 74, the Circuit Court of Appeals for the Ninth Circuit in referring to Huron Holding Corporation said:

"Huron is just another name for the Trust Company."

Respondent contends that Huron Holding Corporation being one and the same as Manufacturers Trust Company, the Trust Company was simply attaching itself, and the attachment proceedings constituted a scheme of connivance and trickery in attempt to give the Court of New York jurisdiction. The respondent further contends that the Supreme Court of New York never acquired jurisdiction under the attachment proceedings or otherwise to render the judgment against respondent herein at the instance of Manufacturers Trust Company.

ASSIGNMENT OF ERRORS

The Court erred in holding and deciding that Huron Holding Corporation and its surety was entitled to have the judgment obtained by Lincoln Mine Operating Company, respondent herein, satisfied on account of the fact that Huron Holding Corporation, garnishee failed and neglected to notify its creditor, Lincoln Mine Operating Company, respondent herein, that the judgment against it had been garnished.

The Court erred in holding and deciding that Huron Holding Corporation could take advantage of its own neglect to respondent herein, its creditor, and claim credit for paying the judgment against it, and thereby avoid paying said judgment twice.

The Court erred in holding and deciding that the State Court of the State of New York acquired jurisdiction to render a judgment against respondent on the service of pro-

cess issuing from the State Court of New York and being served only in the State of Idaho.

The Court erred in holding and deciding that the State Court of New York acquired jurisdiction to issue attachment and garnishment proceedings upon a summons and complaint served only in the State of Idaho in which a personal judgment only was demanded and of which attachment and garnishment proceedings no mention was made, without the supporting affidavit required by New York law.

The Court erred in holding and deciding that the respondent could be deprived of its property by means of attachment and garnishment proceedings of which it never at any time received any notice whatsoever, either actual or constructive.

ARGUMENT

The respondent, Lincoln Mine Operating Company, having no knowledge of any attachment proceedings and knowing as it did that a valid judgment in an action in personum could not be rendered against it on service made in Idaho, defaulted. Had the respondent, Lincoln, known of the attachment proceedings it would have resisted the judgment, as it had a valid defense against the action of Manufacturers Trust Company.

The petitioners for certiorari attempt to show that no issue of the negligence of Huron was raised in any of the Courts below and on page forty-seven of its brief makes this misleading statement:

"In the instant case, Lincoln filed no answer to the motion for satisfaction and raised no issue of negligence or fault on the part of Huron or want of liability to the Trust Company in the New York action."

It will be remembered that the issue was raised on a motion of respondent here for judgment on appeal bond. (Tr. 33) and the answer of National Surety Corporation (Tr. 35) followed by the motion for satisfaction of judgment (Tr. 9). Said motion for satisfaction of judgment was in response to the motion of Lincoln for judgment on the appeal bond. No answer by Lincoln was required under the practice in the lower Court. Under the practice in the lower Court Lincoln could set up anything to defeat the affirmative defense in the motion to satisfy the judgment without pleading it.

A reference to the issues raised in the Circuit Court of Appeals clearly refutes the contention that no issue affecting the attachment proceeding and its regularity was raised in the Court below. When we turn to (Tr. 65-68) being the points raised by petitioner herein in the Circuit Court of Appeals assigning errors, we find:

"(a) By finding that the Huron Holding Corporation has paid \$4,805.55, or any sum, on the judgment of March 3, 1938, under attachment proceedings in the Supreme Court of New York."

"(c) By finding that the Supreme Court of New York acquired jurisdiction of the Lincoln Mine Operating Company in the action brought against it by the Manufacturers Trust Company."

"(e) By finding that the Supreme Court of the State of New York acquired jurisdiction of the cause of ac-

tion brought by the Manufacturers Trust Company against the Lincoln Mine Operating Company."

"(f) By finding that the payment made by the Huron Holding Corporation to the Manufacturers Trust Company is binding upon the Lincoln Mine Operating Company and is in satisfaction of the judgment entered by the lower court."

"(g) By finding that the said judgment of March 3, 1938, entered in the court below is paid in full."

"(h) By concluding that the said judgment of March 3, 1939, in the court below is paid in full."

"(i) By concluding that the said judgment of March 3, 1938, should be satisfied."

Such assertions were repeated in paragraph two and paragraph four of the Statement of Points. Certainly the points raised in the transcript upon which certiorari was granted are still before the Court.

No intention has ever been made to waive or limit these Assignments of Error.

The question of negligence of the garnishee was squarely raised and argued before the Circuit Court of Appeals but the decision of this Court in *Balk vs. Harris*, *Supra*, was not cited. On page 41 of brief of Appellant in the Circuit Court of Appeals is stated:

"Huron, defendant, cannot claim equities by having paid in New York. It was present in the New York court and *did not raise the question of its non-liability there*. That it was negligent, or voluntarily paid when it was not legally required to do so, is no reason why appellant should be deprived of its rights, nor why the judgment in Idaho should be satisfied."

There is no better known rule of law than that a judgment of a lower court will not be reversed even though the court may have based its judgment upon

untenable grounds, provided the judgment rendered by it was right and sustainable upon any ground.

For service upon petitioner, respondent herein, outside of the State of New York and within the State of Idaho, the petitioner for certiorari rely upon section 235, New York Civil Practice Act, which is as follows:

"235. Personal service out of the state without order. Where the complaint demands judgment that the defendant be excluded from a vested or contingent interest in or lien upon a specific real or personal property within the state or that such an interest or lien in favor of either party be enforced, regulated, defined or limited, or otherwise affecting the title to such property or where the complaint demands judgment annulling a marriage, or for a divorce, or a separation; *or where it appears by affidavit filed in the action or as part of the judgment roll in such action that a warrant of attachment, granted in the action, has been levied upon property of the defendant within the state, the summons may be served without an order, upon a defendant without the state in the same manner as if such service were made within the state, except that a copy of the complaint must be annexed to and served with the summons, and that such service must be made by a person or officer authorized under section two hundred and thirty-three of this act to make service without the state in lieu of publication. Proof of service without the state without an order shall be filed within sixty days after such service. Service without the state without an order is complete ten days after proof thereof is filed.*"

It will be observed that before summons may be served the affidavit must be made as in said section above provided. This was never done. This affidavit is absolutely jurisdictional and was intended to give at least a semblance of no-

tice that attachment proceedings had been instituted. The failure of this affidavit rendered the New York Court without jurisdiction to proceed further in the cause and the entire attachment proceeding must fail because of lack of jurisdiction of the New York Court.

Wherefore, petitioner herein and respondent in said cause prays that a rehearing be granted and that full and complete opportunity be given to present this cause to the end that all of the facts and the law may be fully brought before this Court to the end that such relief may be finally granted as this Honorable Court may determine in said cause, and for such other and further relief as may be just and proper, and your petitioner will ever pray.

Respectfully submitted,

WILLIAM H. LANGROISE,

SAM S. GRIFFIN,

ERLE H. CASTERLIN,

J. B. ELDRIDGE,

Boise, Idaho,

Counsel for Petitioner

and Respondent.

The undersigned counsel hereby certifies that the foregoing petition for rehearing is in his judgment well founded, and that the same is presented in good faith and not for delay.

J. B. ELDRIDGE,

Counsel for Petitioner

and Respondent,

Boise, Idaho.

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CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 212

HURON HOLDING CORPORATION,
a corporation, and NATIONAL SURE-
TY CORPORATION, a corporation,

Petitioners,

vs.

LINCOLN MINES OPERATING COMPANY,
a corporation,

Respondent.

**REPLY BRIEF BY LINCOLN IN RESPONSE TO
BRIEF OF HURON IN OPPOSITION TO
RESPONDENT'S PETITION FOR
REHEARING**

WILLIAM H. LANGROISE,
SAM S. GRIFFIN,
ERLE H. CASTERLIN,
J. B. ELDRIDGE,

Boise, Idaho,

Counsel for Respondent.

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STATEMENT AND ARGUMENT

For brevity sake wherever in this brief it becomes necessary to refer to Huron Holding Corporation and National Surety Corporation, petitioners for certiorari, the word Huron will be used. And wherever it becomes necessary to refer to Lincoln Mines Operating Company, respondent and petitioner for rehearing, the word Lincoln will be used.

Huron has filed a brief in opposition to Lincoln's petition for rehearing and an opportunity has been given Lincoln to reply thereto. It is urged in Huron's brief that Lincoln has never raised any issue of the failure of Huron to notify Lincoln of the attachment proceedings against it or to set up any defenses in its behalf, or that it was negligent in any manner with respect thereto, and at the bottom of page nine of Huron's Brief for the purpose of showing that no contention whatever was made in the Court below other than the issue set forth in the quotation, which quotation from the brief of Appellant in the Circuit Court of Appeals is as follows:

"The entire question to be determined is whether a defendant, against whom a judgment in a tort action (claim and delivery) has been entered in the United States District Court in Idaho, may be garnished in the New York Court on account of such judgment, pending his appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit."

The above quotation being only a part of the argument set forth in the Circuit Court of Appeals is deceptive and unfair. It falls within the rule that a half truth is sometimes a falsehood. The full quotation from Lincoln's Brief in the Circuit Court of Appeals is as follows: (top of page 20)

"The entire question to be determined is whether a defendant, against whom a judgment in a tort action (claim and delivery) has been entered in a United States District Court in Idaho, may be garnished in a New York Court on account of such judgment, pending his appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit. The appellant con-

tends that he cannot, and that the garnishment being ineffective the New York Court had no jurisdiction to enter judgment against appellant here, appellant not having been personally served in New York and not appearing therein, nor to issue execution thereon, *nor to require payment by, or receive from, the garnishee any sum as the property of appellant.*

The trial court, upon the motions, correctly stated in its opinion, and we anticipate no contrary contention by appellee, that:"

"The jurisdiction of the New York Court depends upon the attachment."

Again on page forty-one of Lincoln's Brief in the Circuit Court of Appeals referring to Huron, the appellant said:

"That it was negligent, or voluntarily paid when it was not legally required to do so, is no reason why appellant should be deprived of its rights, nor why the judgment in Idaho should be satisfied."

Further quoting from Drake on Attachments the brief states, on page 41:

"It is said that 'a negligent garnishee is no more entitled to protection than any other negligent party, and he is as much bound to look after the proceedings against him and protect himself from an improper judgment, as a defendant in an ordinary suit. If by his failure in this respect the plaintiff gain an advantage over him, he is without relief.' Drake on Attachment, Sec. 6582."

A conclusive answer to all of the arguments of what was raised in the Courts below, or in this Court, or at any stage of the proceeding, is found in the following facts and the conclusions of law that flow therefrom.

Huron made a motion for satisfaction of judgment (tr. 9-16). Positively no date is shown when that motion was filed. Huron amended its motion for satisfaction of judgment on the 29th day of March, 1939 (tr. 42-44). Lincoln filed a motion for judgment on appeal bond March 14, 1939 (tr. 33-35). This motion was against the Surety Corporation, surety for Huron Holding Corporation. National Surety Corporation, from whom it was sought to collect the judgment against Huron, filed its answer to the motion of Lincoln for judgment against it as aforesaid March 22, 1939 (tr. 35-42). It amended its said answer to the motion of Lincoln March 29, 1939 (tr. 44-45). It does not make a particle of difference whether the motion of Huron can be said to be a complaint or an answer, or in the nature of a complaint or an answer. It was seeking relief to have its judgment satisfied. The very foundation of the motion demanded of it that it state facts in that motion sufficient to entitle it to the relief demanded herein, or that it must state facts sufficient to constitute a cause of action. The very basis of the relief demanded was to show that it was entitled to have the judgment of Lincoln against it satisfied on account of the attachment proceedings. In order to do that it was incumbent upon it to allege and prove that it had notified Lincoln that the judgment against it in Lincoln's favor had been attached, and its failure to do so was fatal to that right, as was said by this Court in *Harris vs. Balk*, 198 U. S. 215, 49 Law Ed. 1023, cited by Lincoln in its petition for rehearing, and upon which it relies. Huron did none of the things required of it to be done, but instead it received its notice of attachment July 12, 1938 and on July

15, 1938 (three days later) it notified the Trust Company, its mother, owner and creator, that it owed the money to Lincoln, the amount of the judgment still unpaid (tr. 29-30-31).

American Jurisprudence, Vol. 5, Page 682, states so clearly the rule and cites *Harris vs. Balk*, *Supra*, by this Court as follows:

"The view has been taken that in an action against a nonresident defendant who is served with notice of the same constructively only, as by publication, it is the duty of a garnishee to notify such principal defendant of such garnishment proceedings, if he is able to do so, and also to interpose in behalf of such principal defendant any defense thereto of which he is cognizant and which he is able to make."

It can be seen from the foregoing rule that even where there is constructive service the garnishee must notify its creditor. Instead of that, what are we confronted with? Attempted vague inference that on account of attorneys having given notice that they claimed a lien for their services upon the cause of action (tr. 8-9), and that because on the 13th day of March, 1939 the attorneys for Lincoln gave a receipt for a partial satisfaction of the judgment covered by their lien, that they knew an attachment had been run. No mention whatever is directly or indirectly disclosed of any attachment proceeding or knowledge thereof, yet this Court is urged to accept this unwarranted inference that the solemn duty of Huron to notify Lincoln immediately so it could make its defense had been complied with.

But this is all separate and apart from the fact that Huron in its motion to satisfy the judgment never stated facts sufficient to entitle it to relief, and it never proved any, namely that it had given this imperative notice.

Now what did the National Surety Company do? It filed its answer to the motion of Lincoln for judgment against it. It also filed its amendment thereto as aforesaid. The fact that it set forth no facts constituting a defense, which was incumbent upon it in order to justify itself, and to have the judgment satisfied, it should have pleaded and proved that its principal for which it was surety gave the notice the law demands of it, and this it did not do, hence it stated no facts constituting a defense.

Here we have the situation of neither Huron nor National Surety Corporation justifying themselves by pleading the facts and proving them, showing that they were entitled to have the judgment satisfied, the very foundation of which was the giving of notice by Huron to its creditor Lincoln, yet the learned counsel endeavors by intricate argument to show that it was the duty of Lincoln to plead the negligence of Huron and its failure to discharge its duty that the law enjoined upon it to notify its creditor. This rule applies even where constructive service is given by publication, which in this case was never done.

No one contends that an attachment could not have been gotten out in New York.

THE REAL ISSUE HERE IS NEITHER HURON NOR THE NATIONAL SURETY CORPORATION IS IN A POSITION TO ON ACCOUNT OF THEIR BREACH OF DUTY THAT THEY OWED TO LINCOLN TO NOTIFY IT TO ASK AND DEMAND THAT THE JUDGMENT BE SATISFIED.

The question of the insufficiency of the facts set forth in the motion for satisfaction of judgment by Huron, whether it be a complaint or an answer *is never waived. This is fundamentally jurisdictional.* Also the insufficiency of the facts set forth in the answer of the National Surety Corporation to constitute a defense is *never waived and may be raised at any time in any Court.*

There is not a jurisdiction in this land in which the above rule does not hold good, of which every member of this Honorable Court has full and complete knowledge.

When this Court adopted the new Federal Rules of civil procedure, it fully recognized that rule. Under rule 12, paragraph (h), it is provided:

“Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits.”

It may be improper, but Huron has asked for this in their brief in opposition to petition for rehearing on page six as follows:

"It is significant that the petition omits any indication of the nature of such defense."

One of the defenses that could have been urged against Manufacturers Trust Company, of which the Honorable Leonard G. Biscoe, counsel here, has full and complete knowledge, in that he introduced in evidence in what is known as the Ojus Mining Company Case vs. Manufacturers Trust Company and Alexander Lewis, 82 Fed. (2d) 74, a true and correct copy of the very note sued upon, which is as follows:

Bank of Bay Biscayne
of Miami, Fla.

\$10,000.00

Miami, Florida, June 14th, 1929

On Demand after Date, For Value Received, I, We, or Either of Us, Jointly and Severally, Promise To Pay To The Order Of Alexander Lewis, Ten Thousand 00/00 Dollars, in gold coin of the United States of America, of the present standard of weight and fineness, or its equivalent, at office of Manufacturers Trust Co. 139 Broadway, New York City, with interest thereon at the rate of 6 per centum per annum from date until fully paid; interest payable semi-annually; deferred interest payments to bear interest from maturity at 6 per centum per annum, payable semi-annually. The makers, signers, sureties, guarantors and endorsers hereof, and all parties hereto, hereby severally waive presentment for payment, demand, protest, notice of non-payment and protest of this note: and should this note be collected through an attorney, each of us, severally whether maker, signer, guarantor, endorser, surety, or otherwise a

party hereto, hereby agrees to pay all costs of such collecting including a reasonable attorney's fees.

Lincoln Mine Operating Co. (SEAL)
 By William I. Phillips (SEAL)
 President. (SEAL)

Due.....

No.....

P. O. Address

Endorsed on Back on Left Side

Without recourse

Alexander Lewis

Defts. Ex. A

1-31-34

R. W. P.

Paragraph 4 of the Complaint (tr. 18) states in part "That on or about June 14th, 1929, *in the City and State of New York*, (italics ours) defendant, for value received, made and delivered to one Alexander Lewis its written promissory note for \$10,000, etc."

This is not true as said note was "made and delivered" in the City of Miami, and State of Florida.

A true and correct copy of an assignment thereof from Manufacturers Trust Company to Huron Holding Corporation is as follows, to-wit:

MANUFACTURERS TRUST COMPANY

to

Defts. Ex. T

HURON HOLDING CORPORATION 2-1-34

R. W. P.

ASSIGNMENT OF NOTE

KNOW ALL MEN BY THESE PRESENTS that
 MANUFACTURERS TRUST COMPANY, a corpora-

tion duly organized and existing under the laws of the State of New York, for the better assuring, transferring, confirming and assigning unto HURON HOLDING CORPORATION, a corporation duly organized and existing under the laws of the State of New York, the note hereinafter referred to which was by Manufacturers Trust Company assigned to Huron Holding Corporation by assignment dated February 9, 1932, by these presents does hereby sell, assign, transfer and set over unto Huron Holding Corporation the note dated June 14, 1929 in the principal amount of \$10,000. and bearing interest at the rate of 6% per annum, made by Lincoln Mine Operating Co., payable to Alexander Lewis, and all the right, title and interest of Manufacturers Trust Company to the same;

TO HAVE AND TO HOLD the same unto itself, its successors and assigns to its own use forever, with full power and authority in its name or otherwise to demand, collect, institute legal proceedings and receive any and all sums of money which are or shall be or become due, owing and payable by or on account of said note.

It is understood and agreed and is a condition hereof that said Huron Holding Corporation, its successors or assigns, shall in no event have any recourse against said Manufacturers Trust Company, its successors or assigns, for the said sums of money and interest, or any part thereof.

IN WITNESS WHEREOF said Manufacturers Trust Company has caused these presents to be signed on its behalf by one of its Vice Presidents and its Secretary this.....day of....., 1932.

MANUFACTURERS TRUST COMPANY

By Jas. H. Conroy

Vice-President

Attest:

Chas. M. Close
Secretary

STATE OF NEW YORK)
) ss.:
 COUNTY OF NEW YORK)

On this 26th day of April, 1932, before me came Jas. H. Conroy to me known, who, being by me duly sworn, did depose and say that he resides in the County of Kings; that he is a Vice-President of Manufacturers Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Seal)

Leon A. Rosenheim
 Notary-Public

Notary Public Kings Co. No. 769.
 Reg. No. 3458, Cert. Filed to
 N. Y. Co. No. 1065, Reg. No. 3-R-656
 Commission expires March 30, 1933

Each of which were introduced in evidence by Leonard G. Biscoe, esquire.

It will be noted that in the complaint upon which the judgment was had in the New York Court it was alleged that this identical promissory note was endorsed over to Manufacturers Trust Company by Alexander Lewis, another agent and representative of the Trust Company, who has long since been dead.

It will be seen from the foregoing that *when it is convenient for Manufacturers Trust Company to own the note sued upon in New York Courts, it owns the note. When it is more convenient for Huron to own it, Huron owns the note.* And the last evidence we have of who owns the note certain-

ly points to Huron as the owner of the note. This note is dated June 14th, 1929 and for nine years said note was held when a suit could have been brought in Idaho at any time, and prior to any statute of limitation running against the same. The strong inference it seems to us must be, that suit would have been brought on this note in Idaho, but for good defenses which could have been raised against its collection, only one of which has been mentioned herein.

Huron makes the assertion that Lincoln could have opened its default and made its defense. The answer to that is, How can, or how could Lincoln have done so when it had no knowledge whatever that any such proceeding had ever been taken against it? If this Court can find from cover to cover in the transcript before it any evidence that Huron notified Lincoln of the attachment proceedings it will perform a miracle. If such had been the case counsel for Huron would not be put to the desperate circumstances of urging notice on account of the fact that the attorneys had given notice of their attorneys liens and such had been paid. Notice having been given January 27, 1939 and receipt of payment March 8, 1939 (tr. 8-9, 32-33).

"Huron is just another name for the Trust Company."

In answer to that quotation counsel says on page eleven of their brief:

"The statement that Huron and the Trust Company are identical is not only false, but entirely unsupported by the record."

The above quotation was made from memory and is slightly incorrect. The true quotation is as follows:

"The name Huron was simply another name for the Trust Co."

That is exactly what the Circuit Court of Appeals for the Ninth Circuit, 82 Fed. (2d) 74, at the bottom of page 75 said.

What a deadly parallel! A small excuse for charging false statements and false quotations.

It is urged in the conclusions in the brief of opposition to rehearing that the transcript before this Court is a transcript of Lincoln. Nothing more absurd could be presented. Huron applied to this Court for certiorari and made up its own record. It did not put in its notice of attachment proceeding to Lincoln because none existed, but it did put in its failure and that of National Surety Company in their motions and answers to state facts entitling them to any relief, and it did fail to prove any such facts, which points in law are never waived.

The desire of all Courts is to administer justice.

Technicalities to the contrary notwithstanding.

"Justice is the constant and perpetual wish to render everyone his due."—Justinian.

Wherefore Lincoln prays that this Court grant its petition for rehearing and enter up judgment affirming the Circuit

Court of Appeals because its decision was right, though it may have been based upon incorrect principles.

Respectfully submitted,

WILLIAM H. LANGROISE,
SAM S. GRIFFIN,
ERLE H. CASTERLIN,
J. B. ELDRIDGE,

Boise, Idaho,

Counsel for Respondent.

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CHARLES ELMORE GARDNER
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1940.

No. 212.

HURON HOLDING CORPORATION and NATIONAL SURETY
CORPORATION,

Petitioners,

—against—

LINCOLN MINE OPERATING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO RESPONDENT'S
PETITION FOR REHEARING.

✓ LEONARD G. BISCO,
✓ DANIEL GORDON JUDGE,
Counsel for Petitioners.

ALONZO L. TYLER,
Of Counsel.

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—against—

LINCOLN MINE OPERATING COMPANY,

Respondent.

**BRIEF IN OPPOSITION TO RESPONDENT'S
PETITION FOR REHEARING.***

Statement.

The above entitled cause was heard by this Court on writ of certiorari, and argued (on behalf of petitioners) and submitted on January 13th, 1941. The unanimous opinion of the Court in favor of petitioners was delivered by Mr. Justice Black on February 3rd, 1941, reported in 311 U. S. —, 61 S. Ct. 513, 85 L. Ed. 465. .

A petition for rehearing has now been filed on behalf of respondent, Lincoln Mine Operating Company. Lincoln prays (p. 13) for rehearing, "that full and complete opportunity be given to present this cause to the end that all of the facts and the law may be fully brought before this Court * * *." Of course the respondent has already had full and complete opportunity to present its case. But its petition now mani-

* Filed pursuant to permission, granted March 17, 1941.

festis a wish to abandon its prior legal position, to assert new "facts" (p. 2) and to raise new "points in issue" (p. 5).

It is generally understood that such a complete change of front is not permissible on rehearing.

The editors of "*American Jurisprudence*" in Volume 3 at page 350, Section 806, state:

"In civil cases it is a well-recognized rule that questions not advanced on the original hearing will not be considered on the petition for a rehearing". [Citing *Independent Wireless Telegraph Co. v. Radio Corporation*, 270 U. S. 84, and many other authorities.]

On the same page of the same textbook it is said (top p. 350):

"The general rule which governs an application for rehearing limits the same to the record on appeal; matters outside the record cannot be shown by affidavit. Newly discovered evidence cannot be considered." [Citing *Russell v. Southard*, 12 How. (U. S.) 139, and other cases.]

The petition for rehearing contains no claim that any part of this Court's decision was erroneous. Respondent seeks rather to change the data on which that decision was based. For example, this Court said in its opinion:

"First. Here, New York law clearly governed the validity of the attachment proceedings. The Idaho District Court found, *and it is not denied*, that those proceedings complied with the formal requirements of New York's attachment statutes." (Italics ours.)

But Lincoln now offers to deny the formal regularity of the New York attachment proceedings. (pp. 4, 12).

Likewise in the opinion it is stated:

“It has not been urged here, nor was it urged in the courts below, that Huron was guilty of any negligence, misconduct or fraud in connection with the New York judgment. It has not been claimed that there was a failure to give Lincoln notice of the New York suit against it.”

However, Lincoln attempts now to create contentions of this kind, although the record on which the case is presented contains no suggestion of factual support for any such claims:

This reversal of position comes too late in any event. But it is submitted also that many of the assertions and conclusions contained in the petition for rehearing are either false or unsupported by the record. Some of these assertions are discussed seriatim, as follows:

1. Lincoln's assertion that it was not notified of the attachment.

The central assertion on which the respondent's argument is based (pp. 2, 4, 5, 6, 7, 8, 9) is to the effect that Lincoln was not given notice of the attachment proceedings, either “actual or constructive”.

This assertion is without foundation in the Transcript of Record. On the contrary, the record makes it plain that Mr. Langroise, Mr. Griffin and Mr. Casterlin, Lincoln's original attorneys who knew the facts at the time (R. 1 and 70), never claimed that Huron failed to give notice of the attachment. If they had, they would have produced evidence to that effect, so

as to defeat Huron's motion for satisfaction of judgment.

There was plenty of time and opportunity for Lincoln to produce such proof, if it had existed. Huron's motion was filed on March 13th, 1939 (R. 31, 33, 50). Lincoln's counter-motion for judgment on the appeal bond was made on March 14th (R. 35). The motions did not come on to be heard before Judge Cavanah until March 21st (R. 46 and 54). Thereafter, the Surety Company's answer was filed on March 22nd (R. 42). Still later the District Judge accepted amendments to Huron's motion and to the Surety Company's answer on March 29th (R. 44 and 45). The motions were further considered by the District Judge and not decided until May 4th, 1939 (R. 54, 60, 61 and 62). Both motions were considered on the same evidence (R. 53 and 60). It is recited that the motion against the Surety Company "was heard on the pleadings and documentary evidence" (R. 46), and that the motion for satisfaction of the judgment was decided after Lincoln had "filed its answer thereto, * * * and evidence having been introduced" (R. 54).

The findings of the District Court show that the attachment was levied on July 12, 1938 (R. 49, 56), and that the Sheriff of New York County on July 19, 1938, "duly filed his report and appraisal of said property so attached" (R. 49, 56). The District Court also found as a fact that the summons and complaint were served upon Lincoln in Idaho on July 18, 1938 (R. 49, 56), thus complying with the requirements of the New York law (Civil Practice Act, §§235 and 905; *The American Bank v. Goss*, 236 N. Y. 488, 496) and of this Court with respect to due process

(*Pennoyer v. Neff*, 95 U. S. 714 at 722; *Harris v. Balk*, 198 U. S. 215, at 227).

The District Court further found [R. 59 (IV), bot. 52] on the proofs produced before it, that the payments made by Huron were "not voluntary and were binding upon the Lincoln Mine Operating Company * * *".

• Many of the documents submitted to the District Court, including the affidavits of Bisco, Schneider and Bessell (mentioned at R. 51 and 52), are omitted from the transcript of record. Since the transcript was prepared by Lincoln's attorneys for their appeal from the District Court judgments to the Circuit Court of Appeals (R. 69-70), it is to be assumed that none of the omitted material contained evidence essential to Lincoln's contentions.

The points taken by Lincoln on its appeal to the Circuit Court of Appeals contain no suggestion of claim that Huron was negligent or that Lincoln did not receive notice of the New York proceedings (R. 65-68).

Finally, the notice of attorney's lien filed by Lincoln's attorneys (R. 8-9) and the receipt given by them in satisfaction of said lien (R. 32-33) are consistent only with the conclusion that Lincoln's attorneys knew, well before the judgment was entered in New York (R. 23), that the New York action was based upon an attachment and therefore constituted a threat to the attorneys' lien.

2. The summons and complaint served on Lincoln were in proper form.

Lincoln also seeks to criticize (p. 3) the summons and complaint in the New York action because its form was the same as that used in an action in

personam. The sufficiency of such a summons and complaint, where the Court has in fact taken jurisdiction *in rem* by attachment, is well settled.

Pennoyer v. Neff, *supra*, top page 726 and bottom page 730;

Harris v. Balk, 198 U. S. 215, middle of page 227;

New York Civil Practice Act, §§235 and 905;

The American Bank v. Goss, 236 N. Y. 488 at page 496.

3. Lincoln had a full year to assert a defense, if it had any, in the New York proceedings.

Lincoln now suggests for the first time (bot. p. 9) that if it "had received notice of the attachment proceedings, it would have resisted the judgment, as it had a valid defense * * *". It is significant that the petition omits any indication of the nature of such defense. Lincoln in fact had ample opportunity to open its default and assert any defense it had, but it did not choose to do so (so far as the record shows).

The New York judgment was entered on February 27, 1939 (R. 23). Lincoln admits (top p. 4) that it was fully apprised of this judgment when Huron moved for satisfaction of the Idaho judgment on March 13, 1939 (R. 9, 31, 33, 50). The New York Civil Practice Act (§108) gave Lincoln a full year within which to move to open its default, upon showing that judgment was taken through either "mistake, inadvertence, surprise or excusable neglect". The statute reads in full:

"§108. **Relief against default judgments and orders.** The court, in its discretion, and upon such terms as justice requires, at any time

within one year after notice thereof, may relieve a party from a judgment, order or other proceeding, taken against him through his mistake, inadvertence, surprise or excusable neglect."

Cf. this situation with that discussed in *Harris v. Balk*, *supra*, at page 228.

Where a judgment is set aside for any reason, restitution is provided for by Section 529 of the Civil Practice Act:

"§529. **Restitution after judgment set aside.** Where a judgment is set aside for any cause, upon motion, the court may direct and enforce restitution, in like manner, with like effect and subject to the same conditions, as when a judgment is reversed upon appeal."

4. The New York law and procedure were followed.

The petition for rehearing now for the first time seeks to raise an issue of procedural regularity (pp. 4 and 12). It is asserted that the provisions of Section 235 of the New York Civil Practice Act were not complied with.

Procedural regularity was specifically conceded by counsel for Lincoln in their brief filed in opposition to the petition for certiorari, in which they said at page 4:

"Respondent did concede that New York *procedure* for an attachment or a garnishment was followed." (Italics in the original.)

and again at the bottom of the same page:

"The *procedural steps* for attachment were followed." (Italics in the original.)

The record shows (R. 49, 56) that the "Sheriff of New York County on July 19, 1938, duly filed his report and appraisal of said property so attached." The summons and complaint was served on Lincoln in Idaho on July 18, 1938.

It has been specifically held by the New York Court of Appeals that the affidavit referred to in Section 235 in the Civil Practice Act is not jurisdictional; that no time for making, filing or serving the affidavit is specified; that the statute may be sufficiently complied with by filing an affidavit with the judgment roll; and that the Sheriff's return filed in the action is sufficient compliance and the equivalent of an affidavit.

The American Bank v. Goss, 236 N. Y. 488 at page 496;

Howard Converters, Inc. v. French Art Mills, Inc., 273 N. Y. 238 (particularly at p. 243 where an argument similar to that now advanced by Lincoln is contained in the dissenting opinion, but necessarily disapproved by the majority of the court.)

5. No issue of Huron's negligence raised.

Lincoln seeks to cast doubt (pp. 9 and 10) upon the truth of the following statement taken from page 47 of Huron's main brief:

"In the instant case, Lincoln filed no answer to the motion for satisfaction and raised no issue of negligence or fault on the part of Huron, or want of liability to the Trust Company, in the New York action."

The truth of this statement was not challenged in any way in the brief submitted by Lincoln on January 13th when the cause was heard. Nor is any basis for such a challenge now pointed out. The record is bare of any proofs or attempted proofs by Lincoln tending to cast doubt upon Huron's conduct or good faith in the New York action. No brief, in this Court or below, ever tendered such an issue.

The only argument that was ever made in which the word "negligent" was used with reference to Huron, is quoted at the bottom of page 11 of the petition for rehearing. That argument was simply to the effect that Huron should have opposed the attachment, which Lincoln contended was void as a matter of law. Lincoln thus urged that Huron was "negligent" in failing to oppose such a proceeding, and could of course claim no credit for payment under an invalid attachment.

However, now that it has been established by this Court that the judgment debt was legally attachable in New York, this argument disappears. There could be no duty upon Huron to oppose an attachment to which there was no valid defense. Huron was therefore not "negligent" in declining to engage in such fruitless opposition.

Cf. Harris v. Balk, supra, 227, 228.

Lincoln never claimed failure on the part of Huron, negligence, or want of notice, or that Lincoln itself had a valid defense to the New York action. The attorneys for Lincoln made this clear in their brief in the Circuit Court of Appeals, under the heading "Statement of Question Involved", saying (top of p. 20):

"The entire question to be determined is whether a defendant, against whom a judgment

in a tort action (claim and delivery) has been entered in the United States District Court in Idaho, may be garnished in the New York Court on account of such judgment, pending his appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit".

No other question has ever before been raised or urged by Lincoln's counsel, either below or in this Court.

6. Statement that Lincoln's motion for judgment preceded Huron's motion for satisfaction.

It is twice stated categorically in the petition (pp. 3 and 10) that Lincoln's motion for judgment against the Surety Company was made *before* Huron's motion for satisfaction of judgment. On page 3 it is stated that the transcript "is silent as to when said motion for satisfaction of judgment was filed." This is not true. The record clearly shows that Huron's motion for satisfaction of judgment was filed on March 13 (R. 31, 33, 50). Lincoln's motion against the Surety Company was made the following day (R. 35).

Lincoln's counsel, by inverting the order in which the motions were filed, seek to suggest (p. 10) that Huron's motion was in effect an answer to Lincoln's motion, and that therefore Lincoln did not need to reply. But since Huron's motion was in fact filed first, the argument breaks down. Furthermore, the question is not whether Lincoln "*could* set up anything to defeat * * * the motion to satisfy the judgment without pleading it" (R. 10), but whether Lincoln *did* set up anything to defeat such motion. It had the right and the opportunity to do so. Consequently, the fact that it did not is significant.

7. Use of quotation from the opinion in *Ojus v. Manufacturers*.

The petition for rehearing (bot. p. 7) improperly quotes from an opinion of the Circuit Court of Appeals in the case of *Ojus Mining Company v. Manufacturers Trust Company, et al.*, 82 Fed. (2d) 74 that "Huron is just another name for the Trust Company". This quotation is used to lend color to an accusation (p. 8) that the attachment proceedings were tainted with connivance and trickery.

The statement that Huron and the Trust Company are identical is not only false, but entirely unsupported by the record. There is no suggestion of any proof to that effect or that the question was ever raised in any form.

Furthermore, no court anywhere ever held that "Huron is just another name for the Trust Company". The opinion from which this quotation was taken [82 Fed. (2d) 74] shows at page 75, middle of the first column, that the matter before the Circuit Court was a ruling of the trial court, granting defendant's motion for a directed verdict at the end of the plaintiff's case. No proofs were produced by the defendant and no facts were ever found by any fact-finding body, because the trial judge withdrew the case from the jury. The recitals in the opinion affirming the District Court, from which the above quotation is taken, were assumptions most favorable to plaintiff, "assumed" for the purpose of deciding that motion (see opinion, *supra*, p. 75). They are not a recital of facts found to be true on any trial or by any court.

The use of this quotation, taken from the opinion of another court in another case involving different parties, and torn completely from its context in an attempt to establish a "fact" on which to base an

argument in support of the instant application for rehearing, is, we submit, a fair indication of the legal worth of the whole petition.

Furthermore, there is no legal merit in respondent's objection, which asserts the "connivance" of Huron and the Trust Company. Nor would it make any difference if Huron and the Trust Company were in fact the same person, or even if Huron had itself been the attaching creditor in New York. Identical objections were examined by the Court of Appeals in the leading case of *Wehle v. Conner*, 83 N. Y. 231 at pages 238-239, and found to be specious. As to the connivance objection, the Court of Appeals said in part, per Finch, J., at page 238:

"The proposition was simply to show a conspiracy to accomplish a perfectly lawful purpose. The attachments *were* issued for the purpose of preventing the collection by plaintiff of her judgments. There can be no dispute about that. It needed no further evidence to settle that question. Such is the very object of the attachment and the precise purpose of the law in permitting it to issue. The sole point of the offer is that the parties conspired to do what the law authorizes. The act is neither better nor worse for the conspiracy. It is said it was a scheme to 'nullify a valid process of the court'; but if so it was done by another 'valid process of the court'; an event not at all of uncommon occurrence."

And overruling the objection that the garnishee was also the attaching creditor, the Court of Appeals said (pp. 238-239):

"That the judgment debtor was also one of the attaching creditors is a fact pressed upon our attention. It is a fact in the case. The question asked is whether it is allowable. We are unable to see why it is not. The law which permits the

issue of such attachment awards it to all creditors who bring themselves within its provisions. * * * The learned counsel argues that mischief will result because debtors will procure attachments to be levied upon the debts which they owe and are in process of collection. But an attachment in such a case implies a debt due from the plaintiff in the judgment attached which can serve as the basis of its issue. If such a debt is due the remedy works no wrong. If it is not due, the plaintiff has ample opportunity to resist it in the courts."

Conclusion.

Lincoln's petition for rehearing does not claim that this Court failed to decide, or to decide correctly, any of the issues that were submitted to it at the time of the original hearing. On the contrary, Lincoln seeks now for the first time to argue questions that were heretofore conceded not to be in issue. None of the arguments suggested finds any support in the record. The papers included in the Transcript of Record are those originally designated by Lincoln's counsel when they appealed to the Circuit Court of Appeals (R. 69-70). There is no suggestion, even now, that the record is in any wise incomplete. The assertion of alleged "facts" not found in the record, in an attempt to obtain a rehearing, is therefore quite unjustified.

Wherefore, the petition for rehearing should be denied.

Respectfully submitted,

LEONARD G. BISCO,
DANIEL GORDON JUDGE,
Counsel for Petitioners.

ALONZO L. TYLER,
Of Counsel.

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P. 1

SUPREME COURT OF THE UNITED STATES.

No. 212.—OCTOBER TERM, 1940.

Huron Holding Corporation and National Surety Corporation, Petitioners,	} On Writ of Certiorari to the United States Circuit Court of Ap- peals for the Ninth Circuit.
vs.	
Lincoln Mine Operating Company.	

[February 3, 1941.]

Mr. Justice BLACK delivered the opinion of the Court.

This case involves the effect a federal district ^{court} should give to state court proceedings attaching, while appeal is pending, a judgment previously rendered by the federal court.

Respondent, Lincoln Mine Operating Company, obtained judgment against petitioner, Huron Holding Corporation, in the federal district court for Idaho. Pending appeal of this judgment to the Circuit Court of Appeals, a New York creditor of Lincoln brought suit on a promissory note against Lincoln in a state court of New York. Upon a showing that Lincoln was an Idaho corporation, the New York court caused a warrant of attachment to issue against Lincoln's New York property.¹ In accordance with New York law,² summons upon Lincoln was served by a Deputy Sheriff of Ada County, Idaho. Huron, ~~in answer to~~ the warrant of attachment served upon it in New York, admitted that it was the defendant against which judgment in favor of Lincoln had been entered in the Idaho District Court, and that the judgment was still unpaid, subject to its right on an appeal then pending. After the Circuit Court of Appeals had affirmed the Idaho District Court judgment, but before the mandate had been sent down, the New York court rendered judgment against Lincoln, execution was issued, and under the warrant of attachment the New York Sheriff was commanded to obtain

a New York corporation, answered

and

¹ Sections 902 and 903 of Art. 54 of the New York Civil Practice Act authorize courts to issue warrants of attachment against defendants shown to be foreign corporations in actions against them based on "Breach of contract, express or implied, . . ."

² Section 233, Art. 25, New York Civil Practice Act.

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satisfaction out of the judgment obligation of Huron to Lincoln. Under compulsion of the New York execution Huron paid and then filed a motion in the Idaho court asking that the federal court's judgment be marked satisfied. Lincoln countered with a motion against National Surety Company, the guarantor on Huron's supersedeas bond in the original action, asking that judgment against the surety be entered in favor of Lincoln. After a hearing on both motions, the District Court made findings of fact and conclusions of law, held that the judgment had been fully satisfied, and declined to enter judgment against the surety.³ The Circuit Court of Appeals reversed.⁴ Because the issues involved are important to the orderly administration of justice in the relationship of state and federal courts, we granted certiorari.⁵

Petitioner contends that the attachment was valid under the New York law, and should have been given full effect by the federal court. It is respondent's contention that (1) the attachment proceedings were void; and (2) even if not void, the District Court should not have given effect to them, for the reason that this would be tantamount to an improper deprivation of Lincoln's right to prosecute its suit in the District Court to full payment of the judgment.

First. Here, New York law clearly governed the validity of the attachment proceedings. The Idaho District Court found, and it is not denied, that those proceedings complied with the formal requirements of New York's attachment statutes. But it is contended that at the time of the levy the New York court, under New York law, was without jurisdiction because the Idaho judgment was then pending on appeal and therefore contingent. Respondent points to certain New York cases which lay down the general proposition that "an indebtedness is not attachable unless it is absolutely payable at present, or in the future, and not dependable upon any contingency."⁶ But both the District Court and the Circuit Court of Appeals rejected this argument. And indeed the New York court

³ 27 Fed. Supp. 720.

⁴ 111 F. (2d) 438.

⁵ 311 U. S. —.

⁶ *Herman & Grace v. City of New York*, 114 N. Y. Supp. 1107, 1110, affirmed, 199 N. Y. 600. Other cases cited by respondent which set out the same general principle are: *Fredrick v. Chicago Bearing Metal Co.*, 224 N. Y. Supp. 629, 630; *Reifman v. Warfield Co.*, 8 N. Y. Supp. (2d) 591, 592; *Sheehy v. Madison Square Garden Corp.*, 266 N. Y. 44, 47.

itself necessarily passed upon this question, adversely to respondent's contention. The garnishee's answer in the New York court disclosed that the judgment was pending on appeal, and the New York court's final judgment was not rendered, nor execution issued, until the Idaho judgment had been affirmed. By its action the New York court necessarily decided that the judgment debt was within the scope of New York's attachment laws. And none of the New York authorities to which the respondents direct our attention militate against the soundness of the New York court's ruling. On the contrary, other decisions of the New York courts lead to the conclusion that the judgment—even though on appeal—was sufficiently definite and final to bring it within the New York statute.⁷ To the same effect, in the federal courts the general rule has long been recognized that while appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its decisiveness and finality.⁸

Second. Respondent's next contention is that even though Huron was compelled to pay the New York judgment as a result of attachment proceedings fully authorized by the New York statutes, the Idaho federal court not only can but should require a second payment of the same amount. The Circuit Court of Appeals so held. But since Huron, owing a judgment debt to Lincoln, paid it to a creditor of Lincoln under a valid New York judgment, it certainly should not be required to pay it a second time, except for the most compelling reasons. "It ought to be and it is the object of courts to prevent the payment of any debt twice over."⁹

It has not been urged here, nor was it urged in the courts below, that Huron was guilty of any negligence, misconduct or fraud in connection with the New York judgment. It has not been claimed that there was a failure to give Lincoln notice of the New York suit against it. No federal statute or constitutional provision is invoked as supporting the contention that the Idaho federal

⁷ *Shipman Coal Co. v. Delaware & Hudson Co.*, 219 App. Div. 312, affirmed, 245 N. Y. 567. In determining what is the law of a state, we look to the decisions of lower state courts as well as to those of the state's highest court, and follow the same line of inquiry recently pointed out in *West v. American Telephone & Telegraph Co.*, No. 44 this term, decided December 9, 1940. And see *Erie Railroad Co. v. Tompkins*, 304 U. S. 64.

⁸ E. g., *Railway Co. v. Twombly*, 100 U. S. 78; *Deposit Bank v. Frankfort*, 191 U. S. 499.

⁹ *Harris v. Balk*, 198 U. S. 215, 226.

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court was under a duty to disregard the effect of the payment made by Huron under the compulsion of the valid New York judgment. What is contended is that historically federal courts have carved out a rule to protect themselves from interference by state courts, and that a plaintiff in a federal court proceeding has an absolute right to prosecute his suit and collect his judgment in that court—a right which would somehow be arrested or taken away by giving effect to the New York attachment. This contention rests primarily upon a statement of this Court in *Wallace v. M'Connell*, 13 Pet. 136, 151. That case, a suit on a promissory note, was begun in the federal District Court for Alabama. While it was pending, a suit for collection of the note, based on its attachment, was instituted in an Alabama state court. In the state court action, though tentative judgment was rendered against the federal court defendant as garnishee, the matter was then stayed for six months because no judgment had yet been rendered against the state court defendant. At this point, therefore, actions involving the same issues were concurrently pending in both the state and the federal court without final determination in either. Before final determination of the state proceedings, the case came on for decision in the federal court. That court overruled defendant's plea based on the state court attachment. On appeal, this Court said: "The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that Court, having attached, that right could not be arrested or taken away by any proceedings in another Court. This would produce a collision in the jurisdiction of Courts, that would extremely embarrass the administration of justice. . . . [The doctrine here announced] is essential to the protection of the rights of the garnishee." The concrete question presented to the Court there appears to have been nothing more than a situation in which two courts were called upon to litigate the same issues at the same time.¹⁰ Such is not true in this case.

Another case relied on by respondent is *Wabash Railroad Co. v. Tourville*, 179 U. S. 322. But that case, involving actions in the courts of two states rather than in a state and a federal court, as here, does

¹⁰ Cf. *Princess Lida v. Thompson*, 305 U. S. 456, 466; *Insurance Company v. Harris*, 97 U. S. 331.

not support respondent's contention. In that case this Court did not hold that state laws with reference to attachment and garnishment should not be given effect. On the contrary, it based its decision upon a holding by the Missouri appellate court that the Illinois garnishment was void for failure to comply with statutory requirements, and upon a ruling by the Missouri Supreme Court "that the judgment was foreign to Illinois, and therefore not subject to garnishment there."¹¹ After basing its judgment on these grounds, the Court added a last statement to the effect that "This Court has held that to the validity of a plea of attachment the attachment must have preceded the commencement of the suit in which the plea is made. *Wallace v. M'Connell*, 13 Pet. 136." Whatever may be the present day effect of the principle announced in *Wallace v. M'Connell* and reasserted in the *Tourville* case, that principle has no application here. But it is said that a broader principle, stemming from those cases, is here applicable. And it is true that some courts, both state and federal, have adopted the broader rule for which respondent contends.¹² The leading federal case on the subject is *Thomas v. Wooldridge*, 23 Fed. Cas. 986, No. 13,918. The rule in that case, as announced by Justice Bradley on circuit, was that "judgments of state and federal courts should not be subject to attachments issued by each other." The reasons there given to support this rule were: the debt was quasi in custodia legis; attachments of it would therefore interfere with the court's dignity and prerogatives, excite jealousies and bring about conflicts of jurisdiction; many rights are still left for adjustment after judgment and therefore attachment of a court's judgment would be an inconvenient,

¹¹ If by this the Court meant that under Illinois law such a judgment was not subject to garnishment, the case is nothing more than a holding that one state need not give full faith and credit to a void act of a sister state. But both the Missouri Supreme Court (140 Mo. 614, 624) and this Court (179 U. S. 322, 327) cited *Drake on Attachments* (7th ed. 1891) § 625 for the proposition that by the weight of authority a judgment of one court was not subject to attachment in another court. This citation of the "weight of authority" might indicate that this Court was deciding the issue as a question of "general law", under *Swift v. Tyson*, 16 Pet. 1. If so, this aspect of the decision is no longer of any weight. *Erie Railroad Co. v. Tompkins*, 304 U. S. 64.

¹² E. g., *Thomas v. Wooldridge*, 23 Fed. Cas. 986, No. 13,918; *United States Shipping Board Merchant Fleet Corp. v. Hirsch Lumber Co.*, 35 F. (2d) 1010; *Elson v. Chicago, R. I. & P. Ry.*, 154 Iowa 96. Contra: *Shipman Coal Co. v. Delaware & Hudson Co.*, 219 App. Div. 312, affirmed, 245 N. Y. 567; *Fithian v. New York & Erie R. R.*, 31 Pa. 114. And compare *McNish v. Burch*, 49 S. D. 215, with *Hardwick v. Harris*, 22 N. M. 394.

dangerous and potentially fraud-ridden interference with judicial proceedings. Justice Bradley was also of opinion that recognition of this rule was practically compelled by *Wallace v. M'Connell*.

It is our opinion that no such broad general rule exists. This does not, however, mean that a court which has rendered a judgment is without power to exercise jurisdiction, when properly invoked, to adjudicate newly asserted rights related to the judgment debt. It does mean that later opinions of this Court have undermined the basic reasoning upon which Justice Bradley relied in declaring that judgments in a federal court were never subject to attachment elsewhere. For it is now settled that attachment is wholly the creature of, and controlled by, the law of the state; property and persons within the state can be subjected to the operation of that local law; power over the person who owes a debt confers jurisdiction on the courts of the state where the writ of attachment issues; and by reason of the constitutional requirement that full faith and credit be given the valid actions of a state, courts of one state must recognize valid attachment judgments of other states.¹³ And under congressional enactment federal courts must also give full faith and credit.¹⁴ These later decisions are but a recognition of the greatly developed statutory use of attachment by the states, a development brought about by the increased mobility of persons and property and the expanded area of business relationships. Whatever may have been the necessity for the rule in other times, it does not fit its present day environment.

Further, we do not here, as in *Wallace v. M'Connell*, have a case in which two courts are proceeding in the same matter at the same time. The New York court has proceeded under New York law to final judgment. It has compelled obedience to its judgment. The New York proceedings did not arrest or take away the right of Lincoln to try out its issues with Huron in the federal court for Idaho. Those issues had already been tried and determined in that court, and its jurisdiction to adjust and adjudicate newly asserted rights relating to the judgment had not been invoked. There was therefore no possibility of collision between the two courts, for similar issues were not pending before them at the same time. In fact, far

¹³ E. g., *Harris v. Balk*, 198 U. S. 215, 222; *Louisville & Nashville R. R. v. Deer*, 200 U. S. 176, 178; *Baltimore & Ohio R. R. v. Hostetter*, 240 U. S. 620.

¹⁴ 1 Stat. 122, as amended, 28 U. S. C. § 687. And see note 17, *infra*.

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from colliding with the Idaho court, the New York court accepted as final that court's determination of the issues that it had passed on. For the suit in New York was based on the Idaho judgment, and not on the original cause of action, and "A cause of action on a judgment is different from that upon which the judgment was entered."¹⁵

Both the Idaho federal court and the New York state court decided matters within the respective authority of each. To give effect to the judgment rendered in the New York attachment proceedings cannot, in any manner, interfere with the jurisdiction of the Idaho court. While the Idaho court did have authority to issue an execution for the collection of an unpaid judgment, it would not have enforced an execution for the benefit of Lincoln if the judgment had previously been paid directly to Lincoln. Nor should it issue an execution when the money was paid to Lincoln's creditors by reason of valid attachment proceedings. For this would be to exercise the jurisdiction of a federal court to render ineffective that protection which a garnishee should be afforded by reason of having obeyed a judgment rendered by a state in the exercise of its constitutional power over persons and property within its territory.¹⁶ To take such a step would constitute a denial of that full faith and credit which a federal court should give to the acts of a state court.¹⁷

The District Court properly ordered that its judgment be marked satisfied, and correctly refused to render judgment on the supersedeas bond. The judgment of the Circuit Court of Appeals is reversed, and the judgments of the District Court are affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

¹⁵ Milwaukee County v. M. E. White Co., 296 U. S. 268, 275.

¹⁶ Cf. United States v. Klein, 303 U. S. 276, 281-282.

¹⁷ Penfroyer v. Neff, 95 U. S. 714, 733; Goldey v. Morning News, 156 U. S. 518, 521; Cooper v. Newell, 173 U. S. 555, 567-568; Davis v. Davis, 305 U. S. 32, 39-40.